No. 00-6029-CFX Title: Tracy Ragsdale, Petitioner
v.
Wolverine World Wide, Inc.

Docketed: September 7, 2000 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Sep 5 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 7, 2000)
	Oct 10 2000	Brief of respondent Wolverine Worldwide, Inc. in opposition filed.
	Oct 26 2000	DISTRIBUTED for Conference of November 9, 2000
	Nov 13 2000	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	May 30 2001	Brief amicus curiae of United States filed.
	Jun 6 2001	REDISTRIBUTED for Conference of June 21, 2001
	Jun 25 2001	Petition GRANTED. limited to the question presented by the Solicitor General in the brief for the United States as amicus curiae. SET FOR ARGUMENT January 7, 2002. **********
	Jul 19 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including September, 4, 2001.
	Aug 24 2001	Joint appendix filed.
	Aug 31 2001	Order extending time to file petitioner's brief on the merits to and including September 7, 2001.
	Sep 7 2001	Brief amicus curiae of United States filed.
	Sep 7 2001	Brief amici curiae of National Employment Lawyers Association, et al. filed.
	Sep 7 2001	Brief amici curiae of AFL-CIO, et al. filed.
	Sep 7 2001	Brief of petitioners Tracy Ragsdale, et al. filed.
	Oct 5 2001	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
	Oct 9 2001	Order extending time to file respondent's brief on the merits to and including November 2, 2001.
	Oct 10 2001	Brief amicus curiae of Society of Human Resource Management filed.
	Nov 2 2001	Brief of respondent Wolverine Worldwide, Inc. filed.
	Nov 14 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Nov 26 2001	CIRCULATED.
	Nov 30 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED
	Dec 3 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 3 2001	Record filed.
	Dec 10 2001	Reply brief of petitioner Tracy Ragsdale filed.
	Dec 28 2001	Record filed.

2 pp

No. 00-6029-CFX

Entry	Date	Proceedings and Orders
	Jan 7 2002	ARGUED.

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2000

Tracy Ragsdale; Warren E. Dupwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate

Petitioners

Vs.

Wolverine Worldwide, Inc., doing business as Frolic Footwear, a foreign corporation doing business in the State of Arkansas

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the District Court and the Eighth Circuit Court of Appeals erred in finding 29 C.F.R. § 825.208 and 29 C.F.R. § 825.700(a) invalid.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the judgement below.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit is reported at 218 F.3d 933 (8th Cir., 2000)

The district court's decision in this case is not reported.

JURISDICTION

The United States District Court for the Eastern District of Arkansas entered an order for summary judgement against Petitioner on November 3, 1998. Petitioner then filed a Motion to Alter or Amend, which was denied and entered on August 5, 1999. Petitioner filed a Notice of Appeal with the District Court's clerk on August 11, 1999. A timely appeal was taken by Petitioner to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the District Court grant of summary judgment in an opinion entered on July 11, 2000. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by Order of August 8, 2000. Pursuant to Supreme Court Rule 13.3, this Petition was filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction was vested in the Court of Appeals pursuant to 28 U.S.C. § 1291. The District Court's jurisdiction was founded on 28 U.S.C. § 1331.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

29 U.S.C. § 2601

(a) Findings

Congress finds that-

(1) the number of single parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on the women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act-

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;

(3) to accomplish the purpose described in paragraph (1) and (2) in a manner that accommodates the legitimate interest of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 C.F.R. § 825.208

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any

circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in S 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave--consistent with the employer's established policy or practice--and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid

vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a

determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

29 C.F.R. § 825.700(a)

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit

program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not

equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

STATEMENT OF THE CASE

I. The Nature of the Case and the Procedural History.

On December 22, 1997, Tracy Ragsdale (Ragsdale) filed suit alleging Wolverine had violated the Family and Medical Leave Act of 1993 (FMLA) and discriminated against her in violation of the Americans With Disabilities Act (ADA). Ragsdale filed the Complaint alleging jurisdiction under 28 U.S.C. 1331. The Complaint was timely served on Wolverine, and Wolverine filed an Answer to the Complaint on February 27, 1998. Ragsdale amended her complaint on July 16, 1998 and Wolverine filed its Answer on August 3, 1998.

On June 29, 1998, Ragsdale filed a Motion for Partial Summary Judgment. Wolverine filed a Motion and Memorandum in opposition to Ragsdale's Motion for Partial Summary Judgment and moved for its own Summary Judgment on July 29, 1998. On August 13, 1998, Ragsdale filed a Response to Wolverine's Motion for Summary Judgment.

On November 3, 1998, the District Court denied Ragsdale's Motion for Partial Summary Judgment and granted Wolverine's Motion for Summary Judgment. On November 13, 1998, Ragsdale timely filed a Motion to Alter or Amend. However, on August 5, 1999, the District Court upheld its previous ruling and dismissed Ragsdale's Complaint. Ragsdale filed a Notice of Appeal on August 11, 1999.

On July 11, 2000, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's ruling. Ragsdale timely filed a Suggestion for Rehearing En Banc, and the Eighth Circuit denied the suggestion on August 8, 2000. Ragsdale now timely files this Petition for Certiorari.

II. Statement of Facts Relevant to Issue on Appeal.

The Appellant, Tracy Ragsdale, began her employment with Appellee, Wolverine, on March 17, 1995. She was diagnosed with cancer in February of 1996. Appellant requested and was granted leave to undergo a biopsy and remained on leave until March 17, 1996. Appellant again requested leave on March 18, 1996 in order to undergo surgery to remove her spleen. Appellant remained on leave until the Appellee terminated her in September of 1996.

Appellee failed to designate any of Ragsdale's leave as FMLA leave and failed to give Ragsdale written notice of her FMLA rights as required under 29 C.F.R. §825.301(c). Moreover, after Ragsdale requested FMLA leave in September of 1996, she was terminated because she had exhausted all of her company leave.

After receiving treatment, Ragsdale's cancer is now in remission. Ragsdale's physician released her to work in December of 1996, and she has worked since this time.

Ragsdale filled suit against Wolverine on December 22, 1997. Ragsdale contends, that Wolverine violated the FMLA by failing to designate any of her leave as FMLA leave, and, by terminating her when she requested FMLA leave.

REASONS FOR GRANTING THE PETITION

Reason I

A split exist in the Courts with respect to the issue of whether 29 C.F.R. § 825.208 and 29 C.F.R. § 825.700(a) are valid.

Rule 10(a) of the Rules of this Court indicates that among the reasons the Court considers in granting a writ of certiorari is when a United States Court of Appeals has entered a decision in conflict with decisions of another United States Court of Appeals on the same important matter. In the case at bar, the Eighth Circuit Court of Appeals stated:

> The DOL regulations must be struck down. Although courts must defer to agency expertise, this Court cannot abrogate its mandate as the 'final authority on issues of statutory construction' and must 'reject administrative constructions which are contrary to clear congressional intent.' The DOL regulations create rights which the statute clearly does not confer. ...The DOL regulations dispense with any pretense of balancing in favor of rigid and unnecessary regulations that penalize unwary employers. ...The DOL regulations improperly convert the FMLA into a statute which always provides an additional twelve weeks of leave unless the employer specifically notifies the employee prospectively that she is using her FMLA leave. This is not consistent with the purpose of the FMLA. Congress only intended to mandate a minimum of twelve weeks of leave for employees, it did not intend to construct a trap for unwary employers who already provide for twelve or more weeks of leave to their employees. ...Consequently, this court must hold 29 C.F.R. § 700(a) invalid insofar as it purports to require an employer to provide more than twelve weeks of leave
>
> Ragsdale v. Wolverine, 218 F.3d 933, (8th Cir. 2000) (Appendix A).

The decision of the Eighth Circuit is in direct conflict with decision of the Court of Appeals for the Sixth Circuit. See Plant v. Morton Int'l, Inc., 212 F.3d 929, 934 (6th Cir ., 2000). In Plant, the Sixth Circuit stated, "Because there is a Department of Labor regulation, 29 C.F.R. § 825.208(c), that specifically discusses the requirement of notice by employers, and because we

believe that regulation to be valid, we hold that § 825.208(c) … governs the case sub judice." The Court went on to state, "In particular, 29 C.F.R. § 825.208(a), emphasizes that '[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. 29 C.F.R. § 825.208(a). …If the employer fails to give notice to the employee …, the employer may not designate the leave as FMLA leave retrospectively; only that portion of the leave following notification by the employer may be designated as FMLA leave and count against the twelve-week entitlement. See id. §825.208(c)." Id. at 935.

The Sixth Circuit opinion is directly on point and unequivocally upheld Department of Labor (DOL) regulations at issue. In adhering to and validating the DOL regulations, the Court stated:

> We see no reason why §825.208(c) should not be considered valid and applicable to this case. In the absence of specific statutory language governing a topic, agency regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. The FMLA itself is silent as to the notice an employer must give to an employee before designating his paid leave as FMLA leave. We believe that §825.208(c) evinces a reasonable understanding of the FMLA, reflecting Congress' concern with providing ample notice to employees of their rights under the statute. Moreover, because the FMLA was intended to set out minimum labor standards, we do not believe the §825.208(c) is inconsistent with legislative intent merely because it creates the possibility that employees could end up receiving more than twelve weeks of leave in one twelve month period, due to an employer's failure to notify them that the clock has started to run on their allotted period of time. We therefore disagree with McGregor v. Autozone, 180 F.3d 1305 (11th Cir. 1999), which held that §825.208(c) and 825.700(a) were in conflict with the FMLA's creation of a narrow entitlement to twelve weeks of leave and therefore invalid. Rather, we conclude that those regulations are valid and forbid employers from retroactively designating FMLA leave if they have not given proper notice to their employees that their statutory entitlement period has begun to run.

Plant v. Morton Int'l, Inc., 212 F.3d 929, 935-936 (6th Cir. 2000) (citations omitted).

The Fifth Circuit's decision in Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995), recognizes the logic of the regulations' burden to designate on the employer. The Court emphasized that the regulations place on the employer the responsibility to designate leave as FMLA-qualifying, based on the information provided by the employee. "To require the employee to designate her leave as pursuant to the FMLA would render these provisions meaningless, if not directly contradict them." Id. at 762. The Court in Manuel thus not only acknowledged and relied upon the regulations at issue in this case, but also properly placed the designation obligation in the context of the respective notice responsibilities of the employer and employee, and the congressional purpose in enacting the statute. The Court went on to state:

> Neither the statutory language nor the Act's legislative history disclose congressional will regarding the content of the required notice. We are unable to say that the regulations challenged here are so patently at odds with the legislative scheme as to render them invalid.

Manuel, 66 F.3d at 763. Consequently, while Manuel addressed the interim regulations, its opinion is instructive here.

Likewise, the Fourth Circuit has applied the designation requirement with approval in Cline v. Wal-Mart, Inc., 144 F.3d 294 (4th Cir. 1998). "In the absence of proper notice, Cline was entitled to twelve weeks of FMLA leave plus five days of paid vacation leave, for a total of almost thirteen weeks away from work. Id. at 301. The Court deferred to the DOL regulations, and held that FMLA leave does not begin until the employee is properly notified. Referring to 29 C.F.R. § 825.700(a), the Court stated:

> As the word "requires" indicates, to designate employer-provided leave as FMLA leave an employer must "promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 C.F.R. § 825.208(b). Therefore, although an employer has the option of requiring an employee to designate vacation or other leave as FMLA, that option is waived if the

> employer fails to give proper notice of its intentions. In other words, "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement. 29 C.F.R. § 825.700(a).

Cline, 144 F.3d at 300. While neither Cline nor Manuel directly addressed the validity of the regulations at bar, these cases demonstrate the Secretary's wisdom.

The conflict that now exists between the Eighth and Eleventh Circuits and the Sixth Circuit clearly creates a situation that calls for this Court to resolve the conflict in order that there would be uniform application nationwide of the FMLA. It is therefore respectfully requested that this Court grant the Petition for Writ of Certiorari to resolve the conflict between the Court of Appeals for the Eighth Circuit and the Court of Appeals for the Sixth Circuit.

Reason II

The Eighth Circuit decided important questions of federal law which have not, but should be, settled by this court.

Congress recognized the importance of protected leave by passing the FMLA to balance the demands of work and family. Congress also delegated the responsibility of interpreting these provisions to the DOL, providing that the interpretations were not in conflict with congressional intent. 29 U.S.C. § 2654. Unfortunately, there are conflicts between the circuits regarding the DOL's interpretation of the FMLA which deserve this Court's attention. Without this attention, the FMLA's uniform application concerning both employer and employee rights cannot be realized.

The Sixth Circuit, in Plant[1], has squarely upheld the DOL's regulations interpreting the FMLA. The court stated, "We believe that [29 C.F.R.] § 825.208(c) evinces a reasonable understanding of the FMLA, reflecting Congress' concern with providing ample notice to

employees of their rights under the statute." Plant, 212 F.3d at 935. The court also specifically disagreed with McGregor[2], an Eleventh Circuit opinion that invalidated the DOL's regulations at bar.

Likewise, the Fourth and Fifth Circuits have also determined that the DOL's regulations interpreting the FMLA at bar. In Manuel[3], the Fifth Circuit recognized the validity of the DOL's regulations concerning notice to the employer without expressly mentioning FMLA and stated, "[T]heir disclaimer of any requirement that notice must expressly invoke the FMLA is a reasonable interpretation of the statutory scheme created by Congress." Manuel, 66 F.3d at 763. The court also cited Chevron[4] and stated, "Where a statute is silent or ambiguous, we limit our inquiry to 'whether the agency's answer is based on a permissible construction of the statute.' Administrative regulations promulgated in response to express delegations of authority, like the one at issue here, 'are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" Id.

In Cline, the Fourth Circuit also applied the DOL's regulation requiring the employer to notify the employee that leave is being designated as FMLA leave before the clock starts to run. As a result, the employee was entitled to almost thirteen weeks away from work.

In stark contrast to the circuits above, the Eighth Circuit and Eleventh Circuit has invalidated the DOL regulations, thereby creating a hopelessly confusing situation for employers and employees across the country. In McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir. 1999), the court held that the DOL regulations requiring employers to inform employees that leave counted against FMLA before the clock began to run was invalid. The court stated,

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[1] Plant v. Morton Int'l, Inc., 212 F.3d 929 (6th Cir. 2000).
[2] McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir. 1999)(holding that 29 C.F.R.§ 825.208(c) and § 825.700(a) were in conflict with the FMLA's creation of a narrow entitlement to twelve weeks of leave and therefore invalid.)
[3] Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995).

"Whether we view FMLA as clear and find the regulation clearly contrary to the statute or whether we view FMLA as somewhat ambiguous and find the regulation manifestly contrary to the statute, the regulations are invalid and unenforceable." Id. at 1308.

In the present case, the Eighth Circuit agreed with the Eleventh Circuit and refused to recognize the regulations promulgated by the DOL. In Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933 (8th Cir., 2000), the court concluded that the regulations must be struck down. "Although courts must defer to agency expertise, this Court cannot abrogate its mandate as the 'final authority on issues of statutory construction' and must 'reject administrative constructions which are contrary to clear congressional intent.'" Id. (See App. A at p. 10). However, the Eighth Circuit failed address whether the Secretary's interpretation was reasonable. The 6th Circuit has held that regulations at bar are a reasonable interpretation of the FMLA. By failing to address this prong of the Chevron analysis, the Eighth Circuit has impermissibly intruded in to the exclusive province of the Executive and Legislative branches.

This Court must address the two directly conflicting interpretations of the validity of DOL regulations 29 C.F.R. § 825.208(c) and § 825.700(a). Without such clarification and uniformity, employers occupying several circuits, as well as thousands of employees nationwide, will be subjected to arbitrary application of the FMLA.

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[4] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984).

CONCLUSION

Given the above, this Court should grant the Writ of Certiorari in order to restore Congress' intent to serve both employers and employees, uniformly, in the balancing of the workplace and family responsibilities.

Respectfully submitted,

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By: _____
L. Oneal Sutter, Ark. Bar No. 95031

Dated: September 7, 2000

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3319

Tracy Ragsdale; Warren E. Dupwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate,

Appellants,

v.

Wolverine Worldwide, Inc., doing business as Frolic Footwear, a foreign corporation doing business in the State of Arkansas,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 12, 2000
Filed: July 11, 2000

Before WOLLMAN, Chief Judge, MAGILL, Circuit Judge, and FRANK,* District Judge.

MAGILL, Circuit Judge.

This appeal considers the validity of certain regulations promulgated by the Department of Labor (DOL) under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601, et seq. The appeal arises out of a suit brought by Tracy Ragsdale against Wolverine Worldwide, Inc. (Wolverine) under the FMLA, the American's with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, et seq, and the Arkansas Civil Rights Act of 1993 (Arkansas Act), Ark. Code Ann. § 16-123-101, et seq, alleging that Wolverine improperly denied her FMLA leave and terminated her in violation of the FMLA, ADA, and Arkansas Act. Ragsdale appeals the district court's[1] grant of summary judgment to Wolverine on her FMLA claim. We affirm the judgment of the district court.

*THE HONORABLE DONOVAN W. FRANK, United States District Judge for the District of Minnesota, sitting by designation.

I. BACKGROUND

The relevant factual background of this case is relatively simple. Ragsdale began her employment with Wolverine on March 17, 1995. She was diagnosed with cancer in February 1996 and requested medical leave from Wolverine on February 21, 1996. Wolverine granted her request, and Ragsdale's leave commenced on that date.

Wolverine's leave policy allowed employees with six months of service to take leave for up to seven months. The leave policy required employees on leave to submit requests for extensions of leave every thirty days. Consistent with that requirement, Ragsdale requested extensions of her leave on March 18, April 22, May 21, June 20, July 22, and August 15 of 1996. Each request for an extension was granted by Wolverine. Wolverine did not, however, notify Ragsdale of her leave eligibility under the FMLA or her right to have leave designated as FMLA leave.

On September 20, 1996, Ragsdale was terminated because she had exhausted her seven months of company provided leave and was unable to return to work. On

[1] The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

September 26, 1996, Ragsdale returned to Wolverine and requested additional FMLA leave. She was informed that she had requested and utilized all of her available leave. Ragsdale then requested that she be allowed to return to work on a reduced hour schedule. Wolverine denied her request. Ragsdale's physician released her to work in December of 1996, and she has been actively employed in full-time positions since December 31, 1996. Ragsdale is no longer being treated for cancer and is currently capable of working without restrictions.

On December 22, 1997, Ragsdale filed suit against Wolverine alleging claims under the FMLA, ADA and Arkansas Act. On November 3, 1998, the district court granted summary judgment to Wolverine on Ragsdale's FMLA claim. The court found that the DOL's regulations, which provide that unless the employer prospectively designates company leave as FMLA leave, the twelve week FMLA leave entitlement does not begin to run, are based on an erroneous interpretation of the FMLA and cannot be enforced. The district court also dismissed Ragsdale's ADA and Arkansas Act claims, holding that Ragsdale was not qualified to perform the essential functions of her job at the time of her termination. Subsequently, Ragsdale filed the present appeal.

II. ANALYSIS

Ragsdale claims that the district court erred in invalidating the DOL's regulations and dismissing her FMLA claim. She claims that because Wolverine never formally designated any of the seven months of company leave as FMLA leave, DOL regulations properly mandate that the clock never began to run on her FMLA leave. Thus, Ragsdale contends that she was denied twelve weeks of FMLA designated leave, and that she remained entitled to be restored to her position through December 1996 when she was able to return to work. Wolverine concedes that it did not formally designate Ragsdale's leave as FMLA-qualifying but argues that the DOL regulations are invalid because they impermissibly expand the scope of rights conferred on

employees under the FMLA. We review the district court's grant of summary judgment de novo. See Sahulka v. Lucent Tech., Inc., 206 F.3d 763, 767 (8th Cir. 2000).

A. Chevron Standard of Review

In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court explained the analysis that a court must utilize when reviewing agency decisions which apply or interpret a statute that the agency administers. The Chevron test has two parts. First, a reviewing court must determine whether congressional intent is clear from the plain language of the statute. See id. at 842-43. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (citation omitted). When an analysis of the statute reveals a clear congressional intent, an agency interpretation of the statute contrary to that intent is not entitled to deference. See id. A court must not defer when it "appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845. If, however, the language of the statute is ambiguous, and the legislative history reveals no clear congressional intent, a reviewing court must defer to a reasonable agency interpretation of the statutory provision. See id. at 843. In all cases, although the level of deference afforded an agency interpretation may appear high, the court remains the final authority in matters of statutory interpretation and "must reject administrative constructions which are contrary to clear congressional intent." Id. at 843 n.9.

B. Department of Labor Employer Notice Regulations

Subchapter I of the FMLA sets forth the FMLA's substantive provisions. An

employee is eligible for FMLA leave if she has worked for a covered employer[2] for at least 1,250 hours during the preceding twelve months. See 29 U.S.C. § 2611(2)(A)(ii). The FMLA provides that an eligible employee shall be entitled to a total of twelve workweeks of leave during any twelve-month period for one or more of the following reasons: (1) the birth of the employee's child, (2) the placement of a child with the employee for adoption or foster care, (3) taking care of certain relatives with "serious health condition[s]," and (4) when the employee herself cannot "perform the functions" of her position because she suffers from a "serious health condition." See 29 U.S.C. § 2612(a)(1). After an employee has taken FMLA leave, the employee is entitled to full restoration of her prior position or restoration to an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1).

The FMLA directs the Secretary of Labor to, inter alia, "prescribe such regulations as are necessary to carry out subchapter I." 29 U.S.C. § 2654. Although the FMLA does not itself require that the employer designate leave as FMLA leave, the DOL regulations do require such designation. Seizing on the lack of employer notice provisions in the text of the statute, the DOL has issued a series of regulations requiring that an employer provide an employee with notice that company leave is FMLA leave both in situations where the employee is taking paid leave and where the employee is taking unpaid leave and providing for severe consequences for the failure to give employees such notice. The DOL has mandated that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section . . . ." 29 C.F.R. § 825.208(a). In two separate regulations, the DOL provides that failure to notify an employee that leave taken pursuant to the company leave policy is also

[2]The reach of the FMLA is relatively limited. It only applies to, among other entities, private-sector employers of fifty or more employees. See 29 U.S.C. § 2611(4)(A)(i).

designated as FMLA leave will result in the employee still retaining her twelve week FMLA "entitlement." In 29 C.F.R. § 825.208(c), the DOL applies the principle to paid leave under an employer provided leave program, stating:

> If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employer either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 C.F.R. § 208(c). The DOL also applies the principle to unpaid employer provided leave, stating: "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).

As stated above, the issue before the court is whether the above-quoted DOL regulations are a permissible interpretation of the FMLA. Recently, several courts have addressed this precise question and have come to differing conclusions, resulting in a split of authority. Compare McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir. 1999) (striking down the regulations because they improperly expand the substantive guarantees of the statute); Schloer v. Lucent Tech., Inc., 2000 WL 128698 (D. Md. 2000) (same); Neal v. Children's Habilitation Ctr., 1999 WL 706117 (N.D. Ill. 1999) (same); Donnellan v. New York City Transit Auth., 1999 WL 527901 (S.D.N.Y. 1999) (criticizing the regulations but finding for the employer on narrower ground); with Plant v. Morton Int'l, Inc., 2000 WL 572458 (6th Cir. 2000) (distinguishing between notice requirements for paid as opposed to unpaid leave but appearing to uphold both 29 C.F.R. §§ 825.208(c) and 825.700(a) as valid exercises of regulatory power); Ritchie

v. Grand Casinos of Mississippi, Inc., 49 F.Supp.2d 878 (S.D. Miss. 1999) (holding that the DOL's regulations appropriately "filled the gaps" of the FMLA); Chan v. Loyola Univ. Med. Ctr., 1999 WL 1080372 (N.D. Ill. 1999) (same).

We agree with the Eleventh Circuit that the DOL's regulations improperly "convert[] the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave." McGregor, 180 F.3d at 1308. The FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires. The provisions of the FMLA are noticeably bereft of any purpose to interfere with employer leave policies which grant greater leave rights than the FMLA or to require more generous leave plans than the minimum twelve weeks of unpaid leave mandated by the FMLA. See 29 U.S.C. § 2652(a)("Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act"); 29 U.S.C. § 2653(b) ("Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."); 29 U.S.C. § 2612(d)(2)(B) ("nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave").

The terms of the statute contemplate only that the employer will be required to provide a "total" of twelve weeks of unpaid leave. Entirely absent from the text of the FMLA is any indication that the FMLA was designed to entitle an employee to additional leave under the FMLA when the employer's leave plan already provides for

twelve weeks of FMLA qualifying leave. See 29 U.S.C. § 2612(a)(1) ("employee shall be entitled to a total of 12 workweeks of leave during any 12-month period") (emphasis supplied); 29 U.S.C. § 2612(d)(1) ("If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave . . . may be provided without compensation") (emphasis added).

The FMLA does define the relationship between FMLA leave and employer-provided paid leave when an employee takes leave that qualifies as FMLA leave. It provides:

> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee . . . for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

29 U.S.C. § 2612(d)(2)(B). The obvious purpose of § 2612(d)(2)(B) is to ensure that neither an employee nor an employer will be disadvantaged by the existence of the FMLA. The provision enables the employee to take advantage of *paid* employer-provided leave that the employee would be entitled to regardless of the existence of the FMLA. The provision also protects the employer; if an employee requests FMLA leave, the employer can require that the employee also use employer-provided leave thereby, if providing at least twelve weeks of leave, saving itself from having to extend more leave than provided for in its leave policy. The DOL has failed to appreciate and differentiate those circumstances when notice should be required from employers in order to protect employees' substantive FMLA rights from those situations where notice is not necessary to protect FMLA rights. Rather than simply recognizing that the purpose of § 2612(d)(2)(B) was to disadvantage neither employer nor employee by the existence of the FMLA when the employer already has a sufficient leave policy in

place, the Secretary of Labor has apparently seized upon the "employer may require" provision in § 2612(d)(2)(B) to justify the imposition of a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave.

Other sections of the FMLA strongly support the view that where Congress desired explicit notice provisions with significant consequences for their violation, it provided for them in the text of the statute. In 29 U.S.C. § 2612(e)(1), the statute details notice obligations of employees to employers when the employee requests qualifying leave under the FMLA. See Carter v. Ford Motor Co., 121 F.3d 1146 (8th Cir. 1997) (holding that an employee merely informing the employer that he would be out and did not know when he would return and offering no further information was not adequate notice under the FMLA). In 29 U.S.C. § 2614(b)(1)(A), the FMLA allows an employer to refuse to restore a "highly compensated employee" to his or her former position if holding open the position would cause "substantial and grievous economic injury to the operations of the employer." 29 U.S.C. § 2614(b)(1)(A). In order to do so, however, the employer must give notice to the employee "at the time the employer determines such injury would occur" that the employer does not intend to restore the employee to his or her position. See 29 U.S.C. § 2614(b)(1)(B); see also 29 U.S.C. § 2619 (assessing monetary penalties for employers who do not post notices on the premises of the employer explaining FMLA rights).

Similar to the statutory text, the FMLA's legislative history supports the view that the FMLA was intended only to be a statute that provided a minimum labor standard; an assurance that employers would provide employees with twelve weeks of leave every year. See S. Rep. No. 103-3, at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6 (stating that the FMLA "accommodates the important societal interest in assisting families, by establishing a minimum standard for leave. The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment"); S. Rep. No. 103-3, at 28 (1993), reprinted in

U.S.C.C.A.N. 3, 30 ("Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis"). Any other view of the statute would likely upset the careful compromise reached by Congress when it passed the FMLA. See H.R. Rep. No. 135(I), at 37 (1991) ("The amount of time available for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees' perspective, a twelve week minimum represents a middle ground between the family needs of workers and an employer's business needs.").

The DOL regulations must be struck down. Although courts must defer to agency expertise, this Court cannot abrogate its mandate as the "final authority on issues of statutory construction" and must "reject administrative constructions which are contrary to clear congressional intent." Chevron, 467 U.S. at 843 n.9. The DOL regulations create rights which the statute clearly does not confer. While the statute only requires the employer to provide twelve weeks of unpaid leave, under the DOL regulations, the employer could be forced to provide much more leave. The FMLA was intended to "balance the demands of the workplace with the needs of families," 29 U.S.C. § 2501(b)(1), "in a manner that accommodates the legitimate interests of employers," 29 U.S.C. § 2601(b)(3). The DOL regulations dispense with any pretense of balancing in favor of rigid and unnecessary regulations that penalize unwary employers.

It should be stressed that the court is not holding that any DOL regulations requiring employers to designate leave as FMLA leave would be invalid. There are various situations in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights. For example, notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as

FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks. See Longstreth v. Copple, 189 F.R.D. 401 (N.D. Iowa 1999). Also, in some cases where the leave was anticipated, an employer's failure to provide notice that the leave counts against the FMLA entitlement could interfere with the employee's ability to plan and use future FMLA leave.

Although some situations may require employer notice, this case is not one of them. The DOL regulations improperly convert the FMLA into a statute which always provides an additional twelve weeks of leave unless the employer specifically notifies the employee prospectively that she is using her FMLA leave. This is not consistent with the purpose of the FMLA. Congress only intended to mandate a minimum of twelve weeks of leave for employees, it did not intend to construct a trap for unwary employers who already provide for twelve or more weeks of leave for their employees. It is undisputed that Wolverine's employee leave program was far more generous than the baseline established by the FMLA. Under Wolverine's leave program, Ragsdale was allowed a maximum of thirty weeks of company leave, which she exhausted in full. During this time, Wolverine maintained Ragsdale's health insurance benefits, and even exceeded the requirements of the FMLA by paying Ragsdale's insurance premiums for six months. Moreover, Wolverine held Ragsdale's position open for her during the entire thirty weeks of leave.

Ragsdale's medical condition rendered her unable to work for substantially longer than the FMLA twelve-week period. To find that Wolverine's technical violation of the designation regulations functions as a denial of Ragsdale's FMLA rights would be an egregious elevation of form over substance; a result clearly not contemplated by the FMLA. In this case, the regulations directly contradict the statute by increasing the amount of leave that an employer must provide. Consequently, this court must hold 29 C.F.R. § 700(a) invalid insofar as it purports to require an employer to provide more than twelve weeks of leave time.

III. CONCLUSION

In sum, we affirm the district court's judgment holding that the DOL regulations are not based on a permissible interpretation of the FMLA and that, consequently, Ragsdale's FMLA claim must be dismissed.

A true copy.

Attest:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE
PLAINTIFF

V. NO. J-C-97-475

WOLVERINE WORLDWIDE, INC
d/b/a FROLIC FOOTWEAR
DEFENDANT

ORDER

Presently before the Court are Plaintiff and Defendant's cross-motions for summary judgment on Plaintiff's claims under the Family and Medical Leave Act and Defendant's motion for summary judgment on Plaintiff's claims under the Americans With Disabilities Act and the Arkansas Civil Rights Act.

I. Background

Plaintiff Tracy Ragsdale began her employment with Defendant Wolverine World Wide, Inc. on March 17, 1995. She was diagnosed with cancer in February of 1996, and requested medical leave from Defendant on February 21, 1996. Defendant granted her request, and her leave commenced on that date. Defendant did not notify Plaintiff of her eligibility under the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 ("FMLA"), or her right to have leave designated as FMLA leave.

Defendant's company leave policy allowed employees with six months of service to take leave for up to seven months. The leave policy required employees on leave to submit requests for extensions of leave every thirty days. Consistent with that requirement, Plaintiff requested extensions of her leave on March 18, April 22, May 21, June 20, July 22 and August 15 of 1996. Each request for an extension was granted by Defendant. On September 20, 1996, Plaintiff was terminated because she had exhausted her seven months of company provided leave. On September 26, 1996, Plaintiff returned to Defendant's facility and requested additional FMLA leave. She was informed that she had exhausted all of her leave. Plaintiff then requested that she be allowed to return to work on a reduced hour schedule. Her request was denied.

Plaintiff's physician released her to work in December of 1996, and she has been actively employed in full-time positions since December 31, 1996. Plaintiff is no longer being treated for cancer and she is currently capable of working without restrictions.

On December 22, 1997, Plaintiff filed suit against Defendant alleging claims under the Family and Medical Leave Act, the American's with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq* ("ADA") and the Arkansas Civil Rights Act of 1993, Ark. Code Ann. § 16-123-101, *et seq* ("Arkansas Act"). Both Plaintiff and Defendant have filed motions for summary judgment with respect to the FMLA claim. Defendant has also filed a motion for summary judgment with respect to the ADA and Arkansas Act claims.[1]

II. Summary Judgment Standard

Summary judgment is appropriate when the Court finds that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ.

[1] Plaintiff's motion to voluntarily dismiss her disparate treatment claims, hostile environment claims, and FMLA retaliation claim is hereby granted.

P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party opposing summary judgment may not rest on its pleadings but must present "significant probative evidence" demonstrating that a genuine dispute of material fact exists, and that the moving party is not entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court must view these materials in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor. *Id.* at 255. The moving party bears the initial burden of informing the court of the basis for the motion and of identifying those parts of the record which demonstrate absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met its burden, the nonmovant may not rely on conclusory allegations or mere conjecture, but rather must offer specific facts to support a verdict in its favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (construing Fed. R. Civ. P. 56(e)). As to any claim, or essential element thereof, for which the nonmoving party bears the burden of proof at trial, the nonmoving party must make a showing sufficient to establish the existence of that claim or element.

III. Discussion

A. Plaintiff's FMLA Claim

The FMLA provides eligible employees the benefit of leave time for family and medical emergencies. The FMLA provides that employers must allow employees up to twelve weeks of leave in a year if the leave is requested for one of the purposes specified in the statute, including an employee's "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). At the end of the leave, the employee must be reinstated to his or her position or to a position equivalent in pay, benefits, and other terms and

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conditions of employment. *See* 29 U.S.C. § 2614(a)(1). In the present case, there is no dispute that Plaintiffs' bout with cancer was a "serious health condition" within the purview of the Act. There is also no dispute that Plaintiff provided proper notice to Defendant of her need for medical leave, and that Defendant was fully informed as to the nature of Plaintiff's condition so that Defendant could have determined Plaintiff's eligibility under the FMLA. Thus, the only issues to be determined are (1) whether Plaintiff was an eligible employee, and (2) whether Defendant violated the FMLA in failing to provide her with 12 additional weeks of FMLA leave and reinstatement.

1. *Plaintiff's Eligibility*

The FMLA defines the term "eligible employee" as one who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested ...; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period. 29 U.S.C. § 2611(2)(A). In other words, to be eligible an employee must have been employed "for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave." 29 C.F.R. 825.110(a)(2). When Plaintiff first requested leave on February 21, 1996, she had not been employed by Defendant for the requisite twelve-month period. Thus, she was ineligible. When Plaintiff subsequently requested an extension of her leave on March 18, 1996, she had met all of the requirements for eligibility under the FMLA.

Plaintiff contends that her eligibility under the FMLA should have been determined as of her March 18, 1996 request for leave. Defendant, on the other hand, argues that eligibility for FMLA leave must only be determined on the date that leave first commenced (in this instance February 21, 1996). Defendant contends that Plaintiff's March 18, 1996 request was merely a request for an extension of leave that had already commenced on February 21, 1996. Consequently, Defendant

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argues that Plaintiff was not an eligible employee afforded the protections of the FMLA.

There are cases holding that eligibility under the FMLA is determined at the time when leave is first granted. *See, e.g., Barron v. Runyon*, 11 F. Supp. 2d 676 (E.D. Va. 1998); *Lacoparra v. Pergament Home Centers, Inc.*, 982 F. Supp 213 (S.D. N.Y. 1997). These cases primarily involved intermittent leave situations, where an employee took leave at various periods in between periods of employment. The defendants argued that an employee who was initially eligible for leave could thereafter lose her FMLA eligibility for subsequent leave requests if the employee's qualifications dropped below the threshold requirements. Essentially, these Defendants argued that an employee had to establish her eligibility at the beginning of every request for leave, regardless of whether the employee was initially eligible, and regardless of whether the request was for the same condition. The courts considering this argument have appropriately rejected it. Once an employee establishes eligibility under the FMLA for a particular condition, she should not be required to re-establish eligibility for each subsequent request for intermittent leave.

However, in the present case, Defendant seeks to misapply these holdings. Defendant argues that an employee's eligibility under the FMLA is calculated once, and only once -- at the time the employee first takes leave for a medical condition. According to Defendant, an employee beset by a serious medical condition before she has met the threshold requirements for eligibility can never be eligible for the protections of the FMLA if *any* leave is taken before the statutory requirements are met. Thus, under Defendant's theory, if an employee was diagnosed with cancer after working 11 months and 29 days and then took leave on that date, she would be forever barred for receiving FMLA benefits related to that particular bout with cancer. However, if the same employee waited two days before taking her leave, she would be afforded the full protection of the FMLA. In the

opinion of the Court, this construction of the eligibility requirements does not make sense. Certainly FMLA eligibility may not be stripped away, but that does not necessarily mean that eligibility could not be subsequently acquired through the passage of time.

In this case, Plaintiff first requested leave when she was ineligible for FMLA benefits. She then requested additional leave one month later when she was eligible. Accordingly, Plaintiff was entitled to the protections afforded by the FMLA.[2]

2. *FMLA Violation*

Defendant admits that it never informed Plaintiff of her FMLA eligibility following her requests for leave, and also never designated in writing that Plaintiff's leave was to be counted against her FMLA entitlements. Plaintiff points to the regulations, arguing that liability has been established.

The regulations promulgated by the Department of Labor clearly place the burden upon the employer to inform an employee whether leave is designated as FMLA leave. *See* 29 C.F.R. § 825.208 ("in all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section"). According to the regulations:

> If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of

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[2] In light of this ruling, the Court need not consider whether Plaintiff would have been "deemed eligible" under 29 C.F.R. § 825.110(d). The Court notes, however, that there is persuasive authority finding this regulation invalid because it is inconsistent with the text and intent of the FMLA. *See Wolke v. Dreadnought Marine, Inc.*, 954 F.Supp. 1133, 1134 (E.D. Va. 1997).

> the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 CFR § 825.208. The regulations further state that "if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).

Based upon the plain language of the regulations, it would appear that there is no genuine issue of material fact as to whether Defendant violated the Act. However, Defendant argues that under the facts of this case, no violation can be found as a matter of law because Defendant provided Plaintiff more leave than required by the FMLA, as well as all of the other protections contained in the FMLA.

Indeed, the undisputed facts demonstrate that Defendant's employee leave program was far more generous than the baseline established by the FMLA. Under Defendant's company leave program, Plaintiff was allowed a maximum of 30 weeks of company leave, which she exhausted in full. During this time, Defendant maintained Plaintiff's health insurance benefits, and even exceeded the requirements of the FMLA by paying Plaintiff's insurance premiums for six months. Defendant also held Plaintiff's position open for her during the entire 30 weeks of leave. According to Defendant, these facts preclude any liability for technical violation of the Act or the Regulations.

There is an abundance of case law supporting Defendant's position. Several courts have directly held that there could be no FMLA violation where an employee was provided greater than twelve weeks of leave. *See, e.g., Haggard v. Farmers Ins. Exchange*, 1996 WL 146048 (D. Or. 1996); *Kur v. Fox Valley Press, Inc.*, 1997 WL 89140 at *3-4 (N.D. Ill. 1997). These particular courts have based their holdings on the text of the FMLA itself, without consideration of the

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regulations. However, one court that did consider the regulations reached the same result, concluding that the regulations impermissibly conflicted with the FMLA. *See Cox v. AutoZone, Inc.*, 990 F. Supp 1369 (M.D. Ala. 1998). In *Cox*, the defendant's company leave policy allowed for employees to take 13 weeks of paid leave. The plaintiff took 15 weeks of leave due to her pregnancy, but the defendant failed to designate the leave as FMLA qualifying. When plaintiff was denied a return to her original position at the end of the 15 weeks, she argued that she was still entitled to an additional 12 weeks of FMLA leave.

The court's description of the plaintiffs' position in *Cox* is identical to the position advanced by Plaintiff here:

> Plaintiff is, in effect, converting FMLA from a statute which provides a minimum, a baseline, of federally mandated unpaid leave, into a statute which mandates an additional 12 weeks of leave for all employees, even those who already have employer-provided leave. This is inconsistent with the text and guarantees of the statute.

Cox, 990 F. Supp. at 1373. The court then undertook an extensive analysis of the legislative intent behind the FMLA and the glaringly inconsistent regulations adopted by the Department of Labor. The court found "a clear intent of Congress to protect only those workers who take 12 or fewer weeks of leave." *Id.* at 1380. With respect to the regulations, the court found that they "added requirements which not only go beyond those of the statute, but which are inconsistent with the stated purpose of the statute and which would grant entitlements which were not given by Congress." *Id.* 1381. The court ultimately granted summary judgment for the defendant.

The Court finds the reasoning in *Cox* persuasive and squarely applicable to the present case. Here, Plaintiff took 30 weeks of company provided leave and reaped additional benefits far exceeding those provided by the FMLA. Accordingly, she was not entitled to an additional 12 weeks of FMLA

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leave. Plaintiffs' motion for summary judgment as to liability on her FMLA claim is hereby denied. Defendant's motion for summary judgment on Plaintiffs' FMLA claim is hereby granted.

B. Plaintiffs' ADA and Arkansas Civil Rights Act Claims for Failure to Accommodate[3]

The ADA prohibits an employer from discriminating against an employee "because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). As defined by the ADA, "discrimination" includes:

> Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless ... [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the ... [employer's] business.

Id. § 12112(b)(5)(A). "Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102 (2). "[O]therwise qualified" means that the individual, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). Thus, to establish a claim under the ADA, Plaintiff must show (1) that she has a disability; (2) that she is qualified to perform the essential functions of the job, with or without

[3] The Court will look to case law interpreting the ADA in assessing Plaintiff's failure to accommodate claim under the Arkansas Act. While the Arkansas Act does not specifically address the right to an accommodation of a physical or mental disability, it does refer to the right of an "otherwise qualified person" to "obtain and hold employment without discrimination." Ark. Code Ann. § 16-123-107.

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reasonable accommodation; and (3) that she has suffered adverse employment action because of her disability. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir.1995) (*citing Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995)).

Plaintiff contends that her ADA failure to accommodate claim is not subject to the burden shifting analysis set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), citing a Seventh Circuit case, *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996). Although this issue has not been directly addressed by the Eighth Circuit, the rationale expressed in *Bultemeyer* is persuasive.[4] This case is not a disparate treatment case, and the *McDonnell-Douglas* burden shifting method seems unnecessary and inappropriate. As in *Bultemeyer*, Plaintiff's claim "alleges facts which, if proven, could directly establish a violation of the ADA." *Id.* at 1283. Furthermore, the reason for the discharge is not disputed. Defendant admits that it terminated Plaintiff after she exhausted her company leave (due to her cancer) and could not return to work. Accordingly, there should be no need for indirect proof or burden shifting, and the Court will not apply that framework here. But regardless of what standard is used, Plaintiff must still demonstrate a genuine issue of material fact with respect to each element of her claim.

Defendant first contends that summary judgment is warranted because there is no genuine issue of material fact that Plaintiff is not "disabled" within the meaning of the ADA. Defendant points primarily to the fact that Plaintiffs' cancer is now in remission and that Plaintiff has been gainfully employed since December of 1996.

[4] In *Dush v. Appleton Electric Co.*, 124 F.3d 957 (8th Cir. 1997), the Eighth Circuit did cite with approval the use of the burden shifting analysis in *Price v. S-B Power Tool*, 75 F.3d 362 (8th Cir. 1996). However, *Price* was a disparate treatment case, and the issue of whether burden shifting was appropriate in a failure to accommodate case was not raised in either *Dush* or *Price*.

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The ADA defines "disability" as a "physical or mental impairment that substantially limits" one or more of the major life activities of the individual claiming to have a disability. 42 U.S.C. § 12102(2). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working," 29 C.F.R. § 1630.2(i), as well as "sitting, standing, lifting [and] reaching." 29 C.F.R. § 1630 app.

The record indicates Plaintiff underwent extensive radiation therapy for her cancer during the months prior to her dismissal. The record also indicates that, at least for a significant period of time, Plaintiff was "substantially limited" in many of her life activities. *See* Affidavit of Plaintiff (submitted as Exhibit "A" to Plf.'s Resp. to Def.'s Stmt. of Undisputed Material Facts). Furthermore, although Plaintiff's cancer is now in remission, her disability is to be evaluated as of the time of the employment decision. *Moore v. Payless Shoe Source*, 139 F.2d 1210 (8th Cir. 1998). After a thorough review of the record, the Court believes that there are genuine issues of material fact as to whether Plaintiff is disabled. Accordingly, summary judgment with respect to this issue would not be appropriate.

Defendant next contends that summary judgment is appropriate because Plaintiff cannot show that she was qualified to perform the essential functions of her job, with or without accommodation, nor can she demonstrate that she requested an accommodation prior to her termination. The Eighth Circuit recently stated that "an employee who is 'unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones.'" *Moore v. Payless Shoe Source*, 139 F.3d 1210 (8th Cir. 1998)(*quoting Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir.1997)); *see also Foremanye v. Board of Community College Trustees*, 956 F.Supp. 574, 578-79 (D. Md.1996); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996)(employee who, at time of termination, could not attend work due to medical condition was

not "qualified" under the ADA).

Here, the undisputed material facts demonstrate that Plaintiff was not "otherwise qualified" at the time of her termination. Plaintiff commenced medical leave pursuant to Defendant's leave program on February 21, 1996, and continued on medical leave for 7 months. *See* Def.'s Statement of Undisputed Material Facts ¶¶ 4 - 7 (admitted). Plaintiff requested six 30-day extensions of her medical leave. *Id.* ¶ 7 (admitted). On each leave request, Plaintiff's physicians stated that Plaintiff was unable to perform any work for the length of the requested leave. *Id.* ¶ 8 (admitted). For six months of Plaintiff's leave, Defendant continued to provide Plaintiff with health insurance, paying the premiums consistent with its policy. *Id.* ¶ 9 (admitted). On August 8, 1996, Plaintiff was notified of her rights to Cobra insurance continuation, but opted not to obtain Cobra coverage because she could not afford the premiums. *Id.* ¶ 10 (admitted). Plaintiff's employment with Defendant was terminated on September 20, 1996, because she had exhausted all of her company leave. *Id.* ¶ 11 (admitted). Plaintiff requested additional leave or, in the alternative, a reduced-work schedule on September 26, 1996, six days after her termination. *Id.* ¶¶ 11 - 13 (admitted).

In light of these facts, there exist no genuine issues of material fact as to whether Plaintiff was qualified to perform the essential functions of her job at the time of her termination. Plaintiff was completely unable to work for seven months prior to her termination, and she exhausted all of her company provided leave. There are absolutely no facts in the record to demonstrate that, on the date of Plaintiff's termination, Defendant had any reason to believe that Plaintiff was able to return to work or would have been able to return in the near future. In fact, the undisputed facts clearly demonstrate that she could not have returned to work. Plaintiff's physician did not release her to work until December of 1996, several months after her termination. *Id.* ¶ 14 (admitted). Furthermore, it is clear

that there was no reasonable accommodation that would have allowed Plaintiff to perform the essential functions of her employment in light of the fact that she could not work at all. Employers are not required to accommodate employees by allowing them indefinite leave.[5] *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir.1995); *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996); *Watkins v. J & S Oil Co.*, 977 F. Supp. 520, 526 (D. Me. 1997). As stated by the court in *Meyers*:

> [The ADA] contain[s] no reference to an individual's future ability to perform the essential functions of his position. To the contrary, [it is] formulated entirely in the present tense, framing the precise issue as whether an individual "can" (not "will be able to") perform the job with reasonable accommodation.

Meyers, 50 F.3d at 283. And Finally, Plaintiff did not request her alleged accommodations of additional leave or a reduced work-schedule until six days following her termination. Defendant simply cannot be held liable for failing to provide an accommodation that was not requested until after Plaintiff's termination.

In sum, the ADA does not require employers to be omniscient, nor does it require employers to indefinitely maintain employees on extended medical leave. If an employee seeks to invoke the protections of the ADA, she must at a minimum produce facts demonstrating that she could have performed the essential functions of her employment with an accommodation, and that she requested the accommodation *prior* to her termination. In this instance the record conclusively demonstrates that Plaintiff could not (and in fact did not) meet these requirements. Accordingly, Defendant's motion for summary judgment with respect to Plaintiff's ADA and Arkansas Civil Rights Act claims is hereby granted.

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[5] This principle particularly applies in this instance because Plaintiff had already exhausted seven full months of leave at the time of her termination.

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IV. Conclusion

In accordance with the above, Plaintiff's motion for partial summary judgment (Docket # 21) is DENIED. Defendant's cross-motion for partial summary judgment (Docket # 33) is GRANTED. Defendant's second motion for partial summary judgment (Docket # 47) is GRANTED. Judgment shall be entered forthwith dismissing Plaintiff's claims in their entirety. All other pending motions are hereby DENIED as moot.

IT IS SO ORDERED this 3 day of November, 1998.

James M. Moody
United States District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 11/4/98 BY jt

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
NOV 03 1998
JAMES W McCORMACK, CLERK
By: Jean Burman DEP CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE PLAINTIFF

V. NO. J-C-97-475

WOLVERINE WORLDWIDE, INC
d/b/a FROLIC FOOTWEAR DEFENDANT

JUDGMENT

On November 3, 1998, the Court entered an Order granting Summary Judgment with respect to each remaining claim set forth in Plaintiffs' Second Amended Complaint.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Plaintiffs' Complaint is hereby dismissed with prejudice in its entirety.

IT IS SO ORDERED this 3 day of November, 1998.

James M. Moody
James M. Moody
United States District Judge

THIS DOCUMENT ENTERED ON
DOCKET SHEET IN COMPLIANCE
WITH RULE 58 AND/OR 79(a) FRCP
ON 11/4/98 BY it

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U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
AUG 11 1999
JAMES W. McCORMACK, CLERK
By: Jean Burman DEP.CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

WARREN DUPWE, Trustee in Bankruptcy
for the Tracy Ragsdale Estate; and
TRACY RAGSDALE PLAINTIFFS

vs. CASE NO. J-C-97-475

WOLVERINE WORLDWIDE, INC. d/b/a
Frolic Footwear, A Foreign
Corporation doing business
In the State of Arkansas DEFENDANT

PLAINTIFFS' NOTICE OF APPEAL

COMES NOW all Plaintiffs, by and through Counsel, who hereby give Notice that they appeal the denial of the Motion to Alter or Amend and the Judgment and Order dismissing this action to United States Court of Appeals for the Eighth Circuit. No hearing was held in this matter, so no transcript is available. The entire record is designated as the Record on Appeal.

Respectfully submitted,

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APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-3319EAJ

Tracy Ragsdale; Warren E. Dupwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate,

Appellants,

vs.

Wolverine Worldwide, Inc., doing business as Frolic Footwear, a foreign corporation doing business in the State of Arkansas,

Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

August 8, 2000

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX "D"

No._____

In The

SUPREME COURT OF THE UNITED STATES

____ Term, 2000

Tracy Ragsdale; Warren E. Dupwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate

Petitioners

Vs.

Wolverine Worldwide, Inc., doing business as Frolic Footwear, a foreign corporation doing business in the State of Arkansas

Respondent

CERTIFICATE OF SERVICE

I, L. Oneal Sutter, attorney for the Petitioners, do swear or declare that on this date, September 12, 2000, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed *In Forma Pauperis* and Petition for a Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, be depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Mr. Richard Bennett
Weintrabu, Stock, Bennett,
Grisham & Underwood, P.C.
One Commerce Square, Suite 2560
Memphis, Tennessee 38103
Attorneys for Respondents.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2000.

L. Oneal Sutter

TBD

GRANTED (3)

No. 00-6029

In The

SUPREME COURT OF THE UNITED STATES

TRACY RAGSDALE, et al.,

Petitioners,

v.

WOLVERINE WORLDWIDE, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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Supreme Court, U.S.
FILED
SEP 7 2001
OFFICE OF THE CLERK

HHPP

PARTIES

The petitioners are Tracy Ragsdale and Warren E. Dupwe, trustee in bankruptcy for the Tracy Ragsdale estate. The respondent Wolverine Worldwide, Inc., in connection with the events giving rise to this action, was doing business as Frolic Footwear.

QUESTION PRESENTED

Whether the Secretary has acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the Act's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave?

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29 U.S.C. § 2654

29 C.F.R. § 825.208

29 C.F.R. § 825.301(b)(1)

29 C.F.R. § 825.700(a)

Note to Printer: Please list separately each statute and regulation in the Appendix so the Court can find them.

TABLE OF AUTHORITIES

OPINIONS BELOW

The November 3, 1998, decision of the district court, which is not reported, is set out at pp. --- of the Joint Appendix. The August 5, 1999, order of the district court, which is not reported, is set out at pp. --- of the Joint Appendix. The July 11, 2000, decision of the court of appeals, which is reported at 218 F. 3d 933 (8th Cir. 2000), is set out at pp. --- of the Joint Appendix.

JURISDICTION

The decision of the court of appeals was entered on July 11, 2000. A timely petition for rehearing and suggestion for rehearing en banc was denied on August 8, 2000. The petition for a writ of certiorari was filed on September 5, 2000. This Court granted certiorari on June 25, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in an appendix to this brief.

STATEMENT OF THE CASE

On March 17, 1995, petitioner began her employment with respondent Wolverine Worldwide, Inc.. For almost a year she worked assembling shoes at a division of the company known as Frolic Footwear. Petitioner was paid on a piecework basis, and earned approximately $6.00 an hour.

In February, 1996, Ragsdale was diagnosed with Hodgkins

disease. She underwent surgery for the removal or her spleen. From March through August 1996, Ragsdale underwent radiation treatments five days a week for her cancer. As a result of the surgery and radiation, Ragsdale was for a substantial period of time unable to work.

At the time of the surgery Ragsdale was not yet eligible for leave under the Family Medical Leave Act because she had not worked for Wolverine Worldwide for a full year. Wolverine's leave policies, embodied in a collective bargaining agreement[1], did not provide any paid sick leave or any paid personal leave. Workers with less than 25 years experience could only take vacation leave when the plant closed in July and December; because she had then worked for Wolverine less than a year, Ragsdale was not yet entitled to any vacation. The company, however, did permit workers to take up to seven months of unpaid sick leave, provided that they submitted every 30 days a request for an extension of that leave. On February 21, 1996, Ragsdale requested and was granted unpaid sick leave under this employer-sponsored policy. During the first six months of this period Ragsdale continued to be covered by the employer's health insurance plan.

When in September of 1996 Ragsdale returned to the plant to request another extension of her sick leave, she was advised that no further extensions would be granted, and that she would be dismissed if she did not resume work by September 20, 1996. Although the company policy also permitted unpaid personal leave,

[1]Deposition of Tracy Ragsdale, Ex. 1.

she was not offered that. Ragsdale requested that she be given leave under the Family Medical Leave Act. There is conflicting evidence about how the company responded. According to Ragsdale, her foreman, the plant manager, and one other official all denied familiarity with the FMLA, and never replied to her request for FMLA leave[2]. Another Wolverine official, however, asserted that Ragsdale "was informed that she was not eligible for FMLA, and to the extent she was, it had been incorporated within her company provided leave."[3] Wolverine did not claim, however, that any company official prior to September 1996 had notified Ragsdale that she was, or might be, utilizing FMLA leave. Although 29 C.F.R. § 825.301(c) requires an employer to provide certain information to any employee who qualifies for FMLA leave, Wolverine never provided that information to Ragsdale either. It is undisputed that in September 1996 Wolverine refused to permit Ragsdale to take leave under the FMLA.

Faced with this demand that she return to work or face dismissal, Ragsdale consulted her physician. He advised Ragsdale that she needed to conserve her strength to recover from the radiation treatments, but that she could resume work for four hours a day. Ragsdale asked the company if she could return to work on that reduced schedule, but the employer rejected her request. Ragsdale asserted that other workers had been permitted to work

[2]Deposition of Tracy Ragsdale, p. 40.

[3]Affidavit of Robert H. Smith, p. 2 ¶ 9.

four hours a day, a contention that the company disputed[4]. In any event, Ragsdale was dismissed on September 20, 1996.

Ragsdale resumed work for another employer by mid-December 1996, prior to the point when 12 weeks of FMLA leave granted on September 20, 1996 would have ended. Her cancer has not recurred. As a result of medical bills and loss of income caused by her illness, however, Ragsdale went bankrupt[5].

Ragsdale, together with the trustee of her estate in bankruptcy, brought this action in federal district court in 1997. The complaint asserted, inter alia, that Wolverine had violated the FMLA. Petitioners relied on regulations issued by the Secretary of Labor regarding workers on leave under an employer-provided leave plan. Sections 825.208, 825.301(b)(1) and 825.700(a) of those regulations provide in such a situation that a period of leave does not count as part of an employee's 12-week FMLA entitlement until and unless the employer notifies the employee that it has designated the leave as FMLA leave. Since Wolverine admittedly had not made such a designation or provided such notice, petitioners argued, Ragsdale was still entitled to 12 weeks of FMLA leave when her employer-provided leave ended in September 1996.

The employer moved for summary judgment on two grounds. First, it contended that Ragsdale had never been eligible for any FMLA leave because when she first requested leave she had not yet worked for Wolverine the requisite twelve months. See 29 U.S.C. § 2611(2)(A)(i). Second, the company argued that the designation and notice requirements of the regulations on which Ragsdale had relied were invalid.

The district court held that Ragsdale had become qualified for FMLA leave in March, 1996, on the first anniversary of the date when she had been initially hired. (J.App. -----). The court concluded, however, that the regulations on which petitioners had relied were invalid. (J.App. ----). On appeal the Eighth Circuit held that the regulations were invalid as applied in the instant case; it reasoned, however, that the regulations would be valid in a case in which the employee could show that he or she had some need for the notice which the regulations require.

[4]Deposition of Tracy Ragsdale, pp. 53-56.

[5]Deposition of Tracy Ragsdale, p. 57.

SUMMARY OF ARGUMENT

I. The Family and Medical Leave Act provides workers with a bundle of rights. Those various rights safeguard, elaborate on and enhance the statutory entitlement of 12 weeks of unpaid leave each year for a serious health condition or for certain other specified purposes. The informed exercise of those rights is often essential if a worker is to obtain the full benefit of, or perhaps any benefit at all from, the FMLA.

Information is often the sine qua non of leave under the FMLA. Unlike the federal minimum wage laws, the benefit of which is usually included directly in a worker's paycheck, the FMLA is a complex set of employee prerogatives, options and entitlement. In the frequently occurring situation involving the interrelationship

of FMLA leave and employer-provided leave, an employee must utilize those FMLA rights with particular care.

In the instant case, petitioner Ragsdale, unaware as she was of those rights, derived no benefit at all from the statute. Had Ragsdale known of and effectively used the employee prerogatives provided by the Act, her FMLA and employer-provided leave would have run consecutively, and she would have remained on leave until she was healthy enough to return to work.

II. Where an employee on employer-provided leave is also entitled to FMLA leave, the regulations at issue in this case do not permit an employer to count that leave against the employee's 12 week FMLA entitlement unless the employer has so notified the worker. Absent such notification, a worker is unlikely to realize that he or she is entitled to the benefits of the FMLA, and may well forfeit many or all of the worker's rights under the Act.

The court of appeals correctly recognized that there are situations under the FMLA in which an employee's lack of information so interferes with his or exercise of FMLA rights that the employee cannot fairly be said to have been accorded FMLA leave. It concluded that the regulations would be valid in such instances. That court erred, however, in insisting that the FMLA mandates case-specific determinations of the impact of a lack of information. The text of the statute does not require such a cumbersome approach.

The Secretary of Labor legitimately chose instead to adopt a "bright line rule", treating as essential notice that an employee

is entitled to FMLA leave, and refusing to count employer-provided leave as FMLA leave unless that notice has been provided. That represented a reasonable construction of the FMLA, and was consistent with this Court's practice of adopting bright line rules in construing both the Constitution and statutes.

III. The regulations in this case also operate to provide a straightforward rule for determining whether FMLA and employer-provided leave will run concurrently or consecutively. An employer can assure the leaves will run concurrently simply by providing to the employee the designation and notice specified by the regulations. Where the employer fails to do so, however, the regulations establish as the default rule that the leaves will run consecutively.

The court below objected that the default rule could penalize unwary employers. But some default rule is necessary in this situation. The text of the statute reflects no clear congressional intent as to which default rule should be used, and the Secretary's choice was a reasonable one.

ARGUMENT

I. INTRODUCTION

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq., provides that

> an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . .
>
> (D) Because of a serious health condition that makes

> the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1)(D). The Act confers the same right on any eligible employee who wishes to take leave in order to care for a newborn or newly adopted child, or for a close relative with a serious health problem. 29 U.S.C. § 2612(a)(1)(A)-(C).

The FMLA expressly preserves and encourages more generous leave policies, both those voluntarily adopted by employers and those mandated by state law. 29 U.S.C. §§ 2651-53. Conversely, the law provides that "[t]he rights established for employees under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." 29 U.S.C. § 2652.

The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. § 2654. Pursuant to that authority, the Secretary has promulgated detailed regulations concerning information which employers must provide to employees, and vice versa. Section 825.208(a) of the regulations provides that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA qualifying, and to give notice of the designation to the employee." 29 C.F.R. § 825.208(a). The notice to the employee must explain that leave designated as FMLA leave "will be counted against the employee's annual FMLA leave entitlement." 29 C.F.R. § 825.301(b)(1)(i).

The form of notice is flexible. Notice can be provided orally or in writing. 29 C.F.R. § 825.208(b)(2). If the notice is oral,

it must be confirmed in writing shortly thereafter. "The written notice may be in any form, including a notation on the employee's pay stub." Id. In general, an employer cannot designate leave as FMLA qualifying leave after the leave has already been taken. Retroactive designation and notice are permissible, however, where the employer reasonably was unaware until a later time that the employee was entitled to FMLA leave. 29 C.F.R. § 825.208(b)(1).

A related regulation provides that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).

II. THE REGULATIONS AT ISSUE MUST BE UPHELD UNDER CHEVRON UNLESS THEY EITHER ARE CONTRARY TO THE CLEARLY EXPRESSED INTENT OF CONGRESS OR ARE OTHERWISE AN UNREASONABLE INTERPRETATION OF THE FMLA

A challenge to the validity of administrative regulations is governed by Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (footnotes omitted). In the absence of such

clear congressional intent, an agency's interpretation will be upheld so long as it is "a reasonable one." 467 U.S. at 845.

Deference to the interpretation of the FMLA embodied in the regulations in this case is for several reasons particularly appropriate. Regulations promulgated contemporaneously with the statute they interpret are accorded special weight. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n. 17 (1981). In this case, the interim regulations were promulgated on June 4, 1993, four months after the February 5, 1993 enactment of the FMLA. (58 Fed. Reg. 31821, 31832 (1993)). The rule making process was unusually thorough, drawing hundreds of detailed comments from members of Congress and employer and employee organizations prior to the issuance of the interim rules and again prior to the promulgation of the final regulations. (60 Fed. Reg. 2180 (1995)). The final version of section 625.208(b) contained a number of significant changes, adopted at the behest of several employers and employer organizations, to facilitate the designation process. (60 Fed. Reg. 2207-08 (1995)). On the other hand, no objections appear to have been raised to the provision in the interim and final version of section 625.700(a) that employer-provided leave which the employer has not designated as FMLA leave cannot count against an employee's 12 week FMLA entitlement. (60 Fed. Reg. 2229-30).

III. THE REGULATIONS REASONABLY INTERPRET THE FMLA TO PROVIDE THAT AN EMPLOYEE HAS NOT RECEIVED THE LEAVE REQUIRED BY THE STATUTE IF HE OR SHE HAS NOT BEEN PROVIDED BY THE EMPLOYER WITH INFORMATION ESSENTIAL FOR A FULL AND EFFECTIVE UTILIZATION OF THE SUBSTANTIVE RIGHTS ESTABLISHED BY THE STATUTE

A. The Leave To Which An Employee Is Entitled Under The FMLA Encompasses A Bundle of Rights

The decision of the court of appeals rests on a single, repeatedly stated and fatally flawed premise--that the sole right guaranteed by the FMLA is that 12 weeks during which a worker was qualified for FMLA leave must coincide with weeks during which he or she was in fact on leave. "The terms of the statute contemplate only that the employer will be required to provide a 'total' of twelve weeks of unpaid leave." (J.App. ---)(Emphasis added)(See ---, ---, ---).

In reality both the terms and the operations of the FMLA are far more complex. In addition to requiring that an employee be permitted to take twelve weeks of leave, the FMLA imposes affirmative obligations on employers during that period of leave, provides to employees important prerogatives which they can exercise during that leave, gives employees rights which enable them to conserve or augment the available leave period, and establishes requirements which an employer must meet when the employee returns to work. In some instances employees who under the FMLA are not eligible for reinstatement are nonetheless entitled to the rights, prerogatives and benefits of FMLA leave[6].

The statute imposes on the employer during the term of the FMLA leave several significant affirmative obligations. The employer must maintain coverage under any "group health plan" (as defined in 26 U.S.C. § 5000(b)(1)). 29 U.S.C. § 2614(c)(1). The

[6]See 29 C.F.R. § 825.312(f).

level and conditions of that medical coverage must be the same as would have existed if the employee were still working. Id. Thus, the amount of any premiums the worker pays cannot be increased because of the FMLA leave, and the worker must be afforded an opportunity to select any new types of coverage offered to current workers. 29 C.F.R. § 825.209. Because employers are required to keep records specified by the applicable regulations, 29 U.S.C. § 2616(b), and because regulations require certain records regarding workers on FMLA leave, 29 C.F.R. § 825.500(c), the fact that a worker is on FMLA leave triggers additional record keeping obligations.[7]

In addition, the statute confers on employees several important prerogatives which they may exercise during the period of FMLA leave. First, an employee on FMLA leave is entitled to "substitute" accrued paid vacation leave, personnel leave, and (depending on the type of FMLA leave) family or sick leave for unpaid leave. 29 U.S.C. § 2612(b)(2). An employer's personnel rules might otherwise provide that a worker, although having such accrued paid leave, would under certain circumstances instead be

[7]In this case it is undisputed that Ragsdale in fact received six months of medical coverage during the employer-sponsored leave.

In support of its motion for summary judgment, the company asserted only that it had made premium payments for this coverage "as provided by its policy." Affidavit of Robert H. Smith, p. 2 ¶ 9. It is unclear whether this refers to the health insurance policy or the company's policy regarding workers on unpaid sickleave. This assertion clearly falls short of an allegation that Ragsdale herself paid only the same premiums she would have owed had she remained a full time employee.

Respondent has never contended with regard to Ragsdale's leave that it kept the records required in connection with an FMLA leave.

limited to utilizing employer-provided unpaid leave[8]. By exercising his or her FMLA right to substitute paid leave, a worker can increase his or her income during the leave period, and may be able to extend the total leave period, since the worker would not be using unpaid employer leave during the days of the substituted paid leave.[9]

Second, under the FMLA an employee with the requisite serious health condition is entitled to take leave intermittently, such as by working fewer than the normal number of hours a day. 29 U.S.C. § 2612(b)(1). An employer-provided sick leave plan might not accord the worker this option. The exercise of this prerogative can benefit the worker in either or both of two distinct ways. An employee who elects to work on a reduced schedule will receive a portion of his or her usual paycheck, rather than remaining entirely on unpaid leave. In addition, an employee who works intermittently will be using up his or her FMLA leave at a slower pace, allowing the employee to remain on leave longer or to save part of that FMLA leave for some anticipated or unexpected future need.

[8]Respondent's leave plan appears to operate in this manner. Most workers can only use their vacation leave during a fixed period in July and December of each year, which may not overlap with the employee's absence. Even if the absence does overlap with those periods, it is at best unclear if the employee could insert paid vacation leave in the middle of an unpaid sick leave.

[9]This would occur if the employer-sponsored unpaid leave was for more than 12 weeks. By substituting paid leave during the period when the employee qualified for FMLA leave, the employee would during that time use less of his or her allotment of unpaid employer-sponsored leave.

Third, once an employee is on FMLA leave, the worker would be free to disregard any leave-eligibility standards established by an employer that were more demanding than those for FMLA leave[10]. 29 C.F.R. § 825.207(h). Thus if, for example, the employer's leave plan required certification by a company doctor, the worker could decline to submit to that additional physical examination except in the narrow circumstances in which the FMLA allows the employer to insist on a second medical opinion. 29 U.S.C. § 2613(c). This would avoid the inconvenience and invasion of privacy involved in having to be examined by a health care provider other than the employee's own.

Fourth, in some circumstances this difference in eligibility requirements under the FMLA and under the employer-provided leave plan would afford the worker another, even more important option. When a worker is on FMLA leave, the employer has a right to substitute paid leave, but not to substitute unpaid leave. 29 U.S.C. § 2612(d)(2). If an employee is initially awarded unpaid employer-provided leave with a heightened eligibility requirement, but the employer then notifies the worker that it has also designated the leave as FMLA leave, the employee will know that he

[10]Respondent's leave has two such requirements. First, the employee must provide every 30 days a new certification from his or her health care provider. (J.App. ---). Under the FMLA an employer can only require a new certification if it has reason to believe that an earlier certification is no longer accurate. 29 C.F.R. § 825.305(c). Second, under respondent's plan, sick leave apparently is provided only if the employee is unable to work at all. (J.App. ---). Under the FMLA, on the other hand, a worker with a serious health condition need only show that he or she for that reason is unable to perform his own job. 29 U.S.C. § 2612(a)(1)(D).

or she can then opt to stop meeting that heightened requirement. Since the worker would no longer qualify for the employer-provided leave, the employee would only be utilizing FMLA leave. At the end of the FMLA period, the worker could resume meeting the standard for, and thus once again receive, the employer-provided leave. In this manner, where the employer-provided leave both is unpaid and contains an eligibility standard higher than that for FMLA leave, the employee has the ability under the FMLA to use the FMLA and employer-provided leave consecutively rather than concurrently ,.

Finally, the structure of the FMLA provides employees with a variety of ways to conserve and even augment the amount of leave available for a given need. The statute allots to an employee not a single leave of up to 12 weeks, but "a total" of 12 weeks of leave a year. 29 U.S.C. § 2612(a)(1). Thus an employee can control the amount of leave he or she will have available later in a year by reducing the amount of leave utilized in earlier periods. That option is especially important for leave under subsections (A), (B), and (C) of section 2612, all of which involve care for other people. An employee, by arranging for some other form of care earlier in a year, can assure the continued availability of unused leave later in the year.

Second, the employee is entitled to a new 12 weeks of leave for each 12 month period. 29 U.S.C. § 2612(a)(1). If the employer opts to designate calendar years as the 12 month period it is using, or if the employer fails to make any designation at all, the employee could take 12 weeks of leave at the end of one year

followed by 12 weeks of leave at the beginning of the next. See 29 C.F.R. § 825.200. Thus the employee can control the total amount of continuous FMLA leave he or she has by timing the commencement of that leave towards the end of a calendar year. This is likely to be a particularly valuable option for an employee who has the ability to determine when he or she will utilize FMLA leave, such as by choosing when to begin care for an ailing parent or when to have non-emergency surgery.

Two other FMLA rules are also relevant to how an employee utilizes FMLA leave. Employers can generally designate either paid or unpaid employer-provided leave as also being FMLA leave, causing the FMLA leave to run concurrently; thus if a worker requests two weeks of vacation to take care of a new baby, the employer can designate that leave as also being FMLA leave. But an employer cannot do this if the worker has taken compensatory leave under the Fair Labor Standard Act. 29 C.F.R. § 207(i). Thus it may be important which form of non-FMLA leave a worker chooses to use. In addition, periods of more than a week when the employer's business activity has generally ceased, such as a combined Christmas/New Years break, cannot count towards the 12 week FMLA total. 29 C.F.R. § 825.200(f). Thus a worker who schedules his or her leave to include such a period will be able to remain on leave for an additional calendar week or more.

Finally, when the employee returns from leave, the worker must be restored to the position he or she held prior to the leave, or to an equivalent position. 29 U.S.C. § 2614(a). The employee must

also be afforded any across-the-board raises that were given to other employees during that period of leave. 29 C.F.R. § 825.215(c).

B. Information Is Essential To The Utilization of FMLA Rights

Information is the sine qua non of FMLA leave. The FMLA in this regard is very different from the minimum wage provisions of the Fair Labor Standards Act. For most workers the benefit of the minimum wage laws is included in the paycheck they receive. So long as the employer has obeyed the law, a worker can enjoy the full benefits of his or her FLSA rights simply by cashing that paycheck and spending or saving the proceeds in whatever way he or she pleases. The employee can (and often may) obtain the full benefits of the minimum wage law without ever understanding the details of that law and its implementing regulations, or even knowing of their existence.

But the FMLA is not a simple cash payment; it is a complex interrelated set of employee rights, prerogatives, and options. The benefit (if any) which an employee derives from the FMLA can depend largely on an understanding of the rights he or she has under that system, an understanding which usually must begin with a realization that the worker is entitled to FMLA leave. It is exceedingly unlikely that a worker unaware that he or she qualifies for FMLA leave will ever invoke any of the prerogatives provided by the law, or use any of the methods available to conserve or maximize FMLA leave. An employee who does not realize when and how FMLA leave can be used will be incapable of planning work,

leave, care and/or medical treatment in a manner that obtains maximum (or in some cases any) benefit from the FMLA.

Because an employer's own vacation and other leave rules constantly have a considerable impact on the schedule and lives of its employees, those workers can be expected to familiarize themselves with and rely on those practices. But until an employee has been alerted to the fact the he or she is entitled to FMLA leave, the worker will have little reason to try to understand the often quite different and frequently more favorable parallel set of rules that exist under the FMLA.

The situation in which this problem most often arises creates a particularly great need for express notice about the FMLA. Frequently, as occurred in this case, that need arises where an employee simply asks for leave, and is told by the employer that he or she can take some form of employer-provided leave. Many employees do not even know of the existence of the FMLA. Those who do would be unlikely to realize from a request and response referring only to employer-provided leave that they are also entitled to the benefits, prerogatives and rights of FMLA leave. Workers who need to go on leave generally rely on their employers for a candid explanation of their rights and options; whatever an employer's motives may be, if an employer's explanation omits any reference to the fact that the worker is entitled to FMLA leave, the worker will fairly but mistakenly assume that the explanation which he or she has received is a complete statement of his or her rights.

In the instant case Ms. Ragsdale, although qualified for FMLA leave, derived no benefit whatsoever from the statute. An informed exercise of the rights provided by the FMLA would clearly have been to her advantage. If Wolverine had notified Ragsdale that it was designating her leave as FMLA leave, Ragsdale would have been prompted to inquire about the significance of that designation. Once Ragsdale qualified for FMLA leave, Wolverine was obligated to provide Ragsdale with additional written information about her rights under the statute, 29 C.F.R. § 825.301(c); the company never did so[11]. Wolverine would also have been required to provide whatever additional information Ragsdale might have requested. 29 C.F.R. § 825.301(d).

Armed with the resulting information, Ragsdale would have been able to invoke her FMLA rights in a variety of ways. She could have chosen to temporarily stop qualifying for the company's unpaid sick leave[12], instead using up her FMLA leave, and then have resumed use of the company-provided leave when the FMLA leave had ended. By proceeding in that manner, Ragsdale would have utilized the two leaves consecutively rather than concurrently, and have had enough combined leave to last until she was able to return to work in late 1996. By invoking her right under section 2612(b)(1) to use FMLA medical leave intermittently, Ragsdale could have extended

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[11]Designation might itself have alerted Wolverine officials to their obligation to provide that information.

[12]Ragsdale could have done so by not filing requests for 30 day sick leave renewals, or by not providing the monthly medical certification required by the company.

beyond 12 calendar weeks the total time she was on FMLA leave. If this extended the period of FMLA leave until the company's annual two week July closing, that would in effect have added yet another two calendar weeks to her FMLA leave. 29 C.F.R. § 825.200(f). And, once she passed the first anniversary of the date on which she was originally hired, Ragsdale could have asserted her right under section 2612(d)(2)(B) to substitute her week of vacation pay for a week of the FMLA leave.

Because Wolverine never gave Ragsdale the designation and notice contemplated by the regulations, however, none of this ever came to pass.

C. The Designation Required By The Regulations Is Essential For The Full and Effective Utilization of FMLA Rights

The regulations at issue in this case reflect a determination by the Secretary that where an employee entitled to FMLA leave is placed on company-provided leave without being told of that entitlement, that omission is so likely to impair the effective exercise of FMLA leave rights that the employer cannot be said to have accorded to the employee the leave to which he or she is entitled under section 2612.

The withholding of information essential to the exercise of much of the bundle of FMLA rights is the practical equivalent of a denial of those rights themselves. This Court has long recognized that principle with regard to rights established by the Fifth and Sixth Amendments. A suspect during a custodial interrogation cannot ordinarily exercise or knowingly waive his or her rights to counsel and against self-incrimination without being told of those

constitutional protections. Miranda v. Arizona, 384 U.S. 436 (1966). A state could not meet its obligations under Gideon v. Wainwright, 372 U.S. 335 (1963), to provide trial counsel to indigent criminal defendants if it hired lawyers for that purpose, and had one at the ready in every courtroom, but neglected to mention the availability of counsel to pro se indigent defendants. Defendants who have not been expressly told of their rights to a trial, to a jury, to confrontation of witnesses and to compulsory process cannot waive those rights simply by pleading guilty. Boykin v. Alabama, 395 U.S. 238 (1969).

Although Congress provided that an employee entitled to FMLA leave should be afforded an array of rights, the statute does not specify the point at which so many of those rights have been withheld or interfered with that what remains is insufficient to constitute FMLA leave at all. A denial of some FMLA rights, although less than a denial of all, could undoubtedly be so serious that what remained would no longer count towards meeting an employer's obligation to provide 12 weeks of leave "under section 2612." Some defects are sufficiently harmful that they alter the nature of the subject. A stallion whose mane has been cut off is merely a less attractive stallion, but a gelding is not a stallion at all.

If an employee asked for 12 weeks of leave, but the employer granted only half that number, the denial of the other 6 weeks of leave would violate the FMLA, but the 6 weeks that were granted would (at least absent unusual circumstances) count as FMLA leave

and reduce the worker's allotment accordingly. But if an employee asked for 12 weeks of leave, and was told that he or she had to work for 4 hours a day throughout the period, what the worker received would not count as FMLA leave at all, even though the total hours of leave accorded would be the same as in the first example.

The regulations reflect a determination by the Secretary that denial of notice to an employee receiving employer-provided leave that he or she qualifies for FMLA leave so seriously impairs the bundle of FMLA rights that that leave cannot "count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a). The Secretary has acted with restraint in drawing the distinction between what constitutes merely defective FMLA leave, sufficient to exhaust the employer's twelve week obligation even though constituting a violation of the law, and a partial set of benefits so deficient that they do not constitute FMLA leave at all. Under the regulations, twelve weeks of otherwise sufficient leave which omit medical benefits is FMLA leave nonetheless; the employee cannot obtain more leave during the 12 month period, although he or she can sue for the monetary loss caused by that omission. Only where an employer has failed by designation to notify an employee of his or her FMLA entitlement do the regulations conclude that under the statute the leave simply cannot count as FMLA leave at all. This is precisely the sort of judgment that Congress authorized the Secretary to make by regulation.

The distinction drawn by the regulations is a sensible one.

Where an employer has denied a specific identifiable right, or even several, it will often be practicable after the fact for a court or jury to assess what monetary loss resulted. But where an employer fails even to advise an employee that he or she has qualified for FMLA leave, determining the consequences of that omission will often be impossibly complex. A trier of fact would be forced to reconstruct an elaborate series of consequences, attempting to recreate how the employee and employer would have acted and interacted over what might be a period of months, an exercise in conjecture whose outcome and accuracy would be unknowable. The regulations were adopted for the express purpose of avoiding "protracted 'after the fact' disputes." (60 Fed. Reg. 2207 (1995)). The Secretary permissibly concluded that an employer who failed to provide that critical information should not be deemed to have provided FMLA leave at all.

D. The Secretary Reasonably Adopted A Bright Line Rule Regarding What Information An Employer Must Provide If Employer-Provided Leave Is To Count As FMLA Leave

The Eighth Circuit did not hold that the FMLA notice and designation regulations are always invalid. To the contrary, it insisted that the regulations would be valid in any case in which the specific worker involved actually needed the information to exercise his or her rights under the FMLA. (J.App. ----). The court of appeals summarily applied that holding to the instant case, asserting without explanation that Ragsdale could not have put that information to any use. (J.App. -----).

This disposition was entirely inappropriate in the procedural posture of this case. Wolverine's motion for summary judgment was based solely on its contention that the FMLA regulations are invalid in all applications, a contention accepted by the district court although not by the court of appeals. Under the applicable local rules Wolverine was required to submit a statement of the facts which it asserted were undisputed[13]. Wolverine's statement of undisputed facts did not include an assertion that Ragsdale had no need for the omitted designation and notice[14]. Petitioners were never afforded any opportunity to demonstrate that Ragsdale would indeed have benefitted from the missing information, or even provided an opportunity to respond to an appropriately framed contention to the contrary.

More fundamentally, the court of appeals erred in assuming that the FMLA could only be construed in a manner requiring individualized case-by-case determinations as to whether each employee needed a particular item of information. On that view a regulation would be valid in its entirety only if it stated that notice of designation was to be given "to any employee who needs it" or if it enumerated all the situations in which that notice would be useful to employees. A regulation phrased in general terms would provide employers no meaningful guidance as to when designation and notice are and are not required. A regulation listing all the situations in which notice of designation would be

[13]Local Rule 56.1, E.D.Ark..

[14]Defendant's Statement of Additional Undisputed Facts.

valuable to employees, although long and complex, would be no more helpful to employers, which would rarely know enough about the personal circumstances of each worker to be able to discern which worker would benefit from what information. Under a statute such as the FMLA one of the central purposes of a regulation is to provide clear notice to the affected parties of their respective rights and obligations. The sort of regulation suggested by the court of appeals would fall far short of that goal.

The Eighth Circuit conspicuously failed to appreciate the wide range of circumstances in which employees could put to good use an understanding that they were entitled to the full protections of FMLA leave. Its analysis is devoid of any reference to the prerogatives accorded to employees during a period of FMLA leave, and reflects little understanding of the complex ways in which employees can conserve, or augment the number of, available FMLA leave days. The Secretary, rather than attempting to fashion a complex, fact-dependent notification requirement, properly adopted a single bright line rule.

This Court has repeatedly and quite self-consciously created bright line rules in interpreting the constitution[15], statutes[16],

[15]Quill Corporation v. North Dakota, 504 U.s. 298 (1992); Arizona v. Roberson, 486 U.S. 675 (1988); Michigan v. Jackson, 475 U.S. 625 (1986); New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973); Pennsylvania v. Mimms, 434 U.S. 106 (1977).

[16]U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 779 (1989); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988); Basic, Inc. v. Levinson, 485 U.S. 224, 233 (1988).

treaties[17], and rules[18]. It has also approved the decision of administrative agencies to create such clear rules[19]. The bright line created by the regulations in this case provides employers with a clear statement of the simple steps they must take if they want to assure that the leave they are providing is sufficient to count as FMLA leave. The Secretary was under no obligation to adopt the vaguely phrased standard proposed by the court of appeals which, although more favorable to some employers who fail to provide designation and notice, would leave most employers uncertain as to the scope of their obligations, and many employees unaware of their rights.

IV. THE REGULATIONS PROVIDE A REASONABLE INTERPRETATION OF WHEN UNDER THE STATUTE FMLA LEAVE AND EMPLOYER-PROVIDED LEAVE DO AND DO NOT RUN CONCURRENTLY

The coexistence of FMLA leave and various types of employer-sponsored leave poses a question that has long arisen in personnel administration. Many employers afford their workers several different types of leave, paid and/or unpaid. Each form of leave has its own criterion of eligibility, some broad (e.g., vacation or personal leave) and some quite narrow (funeral leave). See 5 C.F.R. part 630. It inevitably occurs that circumstances arise in which an employee is eligible for several different types of leave. A worker hospitalized for appendicitis, for example, would

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[17]Chan v. Korean Air Lines, 490 U.S. 122 (1988).

[18]Houston v. Lack, 487 U.S. 266, 275 (1988).

[19]Auriello Iron Works, Inc. v. NLRB, 517 U.S. 781, 788 (1996).

typically qualify to use both sick leave and vacation leave.

Any system with multiple, potentially overlapping types of leave requires a rule for resolving two issues: (1) whether the employee or the employer selects which type of leave is used, and (2) whether a day of absence qualifying for two types of leave must be deducted from both or only from one. Under most employer plans such an absence will utilize only one type of leave; the periods for vacation leave and sick leave, for example, ordinarily can be used consecutively. A similar problem arises if a longer period of leave encompasses a holiday, such as Thanksgiving, that is accorded to all or most workers; that holiday may or may not be included in the determination of how many days of leave were used. In these circumstances the employer's own policy (possibly constrained by a collective bargaining agreement) will determine whether the overlapping types of leave will run concurrently.

A more complex situation arises where, as here, the two (or more) types of overlapping leave arise from different sources, one an employer-provided leave plan, the other the requirements of federal (or state) law. In such a case a determination must be made as to whether the choice between concurrent and consecutive use of the two overlapping types of leave will be dictated by federal law or be resolved according to the wishes of the employer or of the employee. The very creation by the FMLA of federally mandated leave requires the existence of a rule regarding how the choice between consecutive and concurrent utilization will be made.

That question is in some but not all situations addressed and

resolved by the express terms of the FMLA. First, if the employee requests leave, and the employer offers only unpaid FMLA leave, the employee in turn can insist that the employer "substitute" certain types of paid leave. 29 U.S.C. § 2612(d)(2). Substitution means that the employee will be consuming concurrently his or her entitlement to FMLA leave and the employer-provided paid leave, but the employee will benefit from the income under the paid employer-sponsored leave.

Second, if the employee asks only for FMLA leave, preferring to avoid using up his or her employer-provided paid leave, the employer in turn can insist that the employee substitute certain types of paid leave. That insistence will cost the employer money, but will mean that the leaves run concurrently. Because the employer must act through the employee, "requir[ing] the employee to substitute" the employer-provided leave, the employee is necessarily alerted to the fact that both types of leave are being consumed. Section 2612(d)(2) limits the types of paid leave which one party or the other can, by demanding substitution, cause to be used concurrently with the FMLA leave.[20] If, however, the employer offers or the employee requests only FMLA leave, and no request for substitution is made, the FMLA leave and employer-provided paid

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[20]For FMLA leave under subsections (A) and (B), substitution can be required of paid vacation, personal, or family leave. For FMLA leave under subsection (C), substitution can be required of paid vacation, personal, family or sick leave. For FMLA leave under subsection (D), substitution can be required of paid vacation, personal, or sick leave.

Substitution cannot be required of other types of paid leave, such as paid disability leave.

leave (assuming the worker is absent long enough to later need to invoke the employer-provided leave) will run consecutively.

The statute, however, is silent with regard to two other situations--(1) an employee entitled to FMLA leave simply requests leave, without mentioning the FMLA, and the employer in providing leave explains only that it is some form of employer-provided leave, and (2) (less commonly, but the case here) an employee initially ineligible for FMLA leave, and thus awarded some form of employer-provided leave, later becomes eligible for, but does not (at least for a period of time) request by name, FMLA leave. The substitution provision of section 2612(d) does not apply, since the employee in both situations is already receiving employer-provided leave. No provision of the statute itself establishes a rule for determining in these cases whether FMLA leave will be deemed to run concurrently with the employer-provided leave. The administration of the FMLA, however, clearly requires the existence of some such rule, because without it there would be no way to know at the end of the employer-provided leave period whether an employee was still entitled to FMLA leave (because the leaves run consecutively) or was not (because the leaves had run concurrently).

This question obviously is not one to which "Congress has spoken directly." Chevron, 467 U.S. at 842. To the contrary, the complete absence of any statutory provision for determining whether (and if so when) FMLA and employer-provided leave shall run concurrently or consecutively in these two situations is undeniably "a gap for the agency to fill." 467 U.S. at 843.

The regulations fill this gap by establishing a standard and procedure that are analogous to the approach taken by section 2612(d). As under section 2612(d), the employer is accorded the option of insisting that FMLA and employer-provided leave run concurrently. In the absence of employer designation under the regulations, as in the absence of employer (or employee) substitution under section 2612(d), the two types of leave will run consecutively. Consecutive utilization of the two forms of leave is the default rule if designation and notice do not occur. The notice requirement included in the regulations, like the section 2612(d) requirement that the employer act through the employee, assures that the employee will understand that the two types of leave are running concurrently.

Neither the employer nor the court of appeals objected to the fact that the regulations permit concurrent utilization of FMLA and employer-sponsored leave, or to the fact that the employer is allowed to decide whether that will occur. They challenge only the default rule. But the existence of some default rule is a necessary part of a legal regime in which the employer has (but may fail to exercise) the right to decide whether or not the employer-sponsored leave counts as and thus runs concurrently with FMLA leave. Of course, the Secretary could have chosen the opposite default rule--deeming employer-provided leave also to be FMLA leave unless the employer designated otherwise. But the text of the statute itself obviously does not require that one default rule or the other be selected.

The Secretary's decision to adopt the default rule in question was assuredly reasonable. That default rule provides the employer with an incentive to resolve the matter quickly, thus enabling the worker to exercise his or her FMLA rights in an effective and informed manner. Thus employer inaction is not permitted to interfere with or deny the exercise of FMLA rights. See 29 U.S.C. § 2615(a)(1). If a federal employee asks for and receives annual leave, sick leave, or some other type of agency-provided leave, it is the policy of the federal government not also to deduct that period of leave from the worker's 12 week FMLA entitlement, unless the worker expressly asks that the two types of leave run concurrently[21]. The default rule at issue in this case, in the absence of any notice to the contrary to the affected employee, deems the employer's policy to be the same as that of the national government.

The court of appeals objected that the default rule could operate to the disadvantage of an "unwary" employer if the employer, which would have preferred that the FMLA and employer-provided leave run concurrently, neglected to exercise its right to designate the leave as FMLA leave. (J. App. ----). The opposite default rule, however, although preferred by the employer in this case, would in turn impose a more serious burden on many employees. If mere inaction on the part of an employer had the effect of

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[21] 5 C.F.R. § 630.1203(h)("An agency may not put an employee on family and medical leave and may not subtract leave from an employee's entitlement to leave . . . unless the agency has obtained confirmation from the employee of his or her intent to invoke entitlement to leave [under the FMLA].")

making FMLA leave run concurrently with the employer-provided leave, an employee who was told only that he or she was receiving employer-provided leave would ordinarily have no reason to conclude or suspect that he or she was also utilizing his or her FMLA leave.

The Secretary reasonably concluded that the employer, not the employees, should run the risks of unwariness. Employers are in a far better position than workers to familiarize themselves with the provisions of, and their obligations under, the statute and regulations. The FMLA applies only to employers with at least 50 employees. Companies of that size will already have personnel officials, or accounting or other outside firms, that deal with the myriad of federal and state laws regarding the employment relationship; most will have either in house counsel or attorneys on retainer. Countless government and private publications alert personnel officials to their responsibilities under the FMLA. The FMLA regulations include a model leave-application form which expressly alerts company officials to the need to make a designation decision. 29 C.F.R. pt. 825 App. D. If in those circumstances an employer fails to make the designation it would have wanted, that is not because the firm has been unfairly blindsided, but because its human resources department, outside consultants or lawyers simply did not do their jobs. An ordinary worker, on the other hand, has neither the staff, the resources nor the expertise necessary to learn of the existence of a default rule favorable to the employer, or thus to understand that an employer's mere silence means that the worker is utilizing his or her FMLA

leave concurrently with his employer-provided leave.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

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APPENDIX OF STATUTES AND REGULATIONS

29 U.S.C. § 2612(a)(1)

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(d) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(b)(1)

[L]eave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary.

29 U.S.C. § 2612(d)(2)(B)

An eligible employee may elect, or an employer may require, the employee to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

29 U.S.C. § 2614(c)(1)

[D]uring any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as

defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions the coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

29 U.S.C. § 2615(a)(1)

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

29 U.S.C. § 2654

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

29 C.F.R. § 825.208

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some

cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave—consistent with the employer's established policy or practice—and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not

initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absences preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the

employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

29 C.F.R. § 825.301(b)(1)

The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. . . . Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208) . . .

29 C.F.R. § 825.700(a)

. . . If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

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In the Supreme Court of the United States

TRACY RAGSDALE, ET AL., PETITIONERS

v.

WOLVERINE WORLDWIDE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Family and Medical Leave Act of 1993 (FMLA or Act) requires covered employers to provide eligible employees with "a total of 12 workweeks of leave during any 12-month period" for specified reasons, 29 U.S.C. 2612(a)(1), including leave needed "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee," 29 U.S.C. 2612(a)(1)(D). The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. 2654. The question presented is as follows:

Whether the Secretary has acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the Act's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave.

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WOLVERINE WORLDWIDE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Family and Medical Leave Act of 1993 (FMLA or Act), 29 U.S.C. 2601 *et seq.*, provides that

> an eligible employee shall be entitled to a total of 12 work weeks of leave during any 12-month period * * *
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. 2612(a)(1)(D). The Act confers an equivalent right on any eligible employee who wishes to take leave in order to care for a newborn or newly adopted child, or for a close relative with a serious health condition. 29 U.S.C. 2612(a)(1)(A)-(C). The term "eligible employee" is defined to mean an employee who, *inter alia*, "has been employed

* * * for at least 12 months by the employer with respect to whom leave is requested." 29 U.S.C. 2611(2)(A)(i).

An employer may comply with its obligations under the FMLA by providing unpaid leave. 29 U.S.C. 2612(c). The Act provides, however, that "[a]n eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under [29 U.S.C. 2612(a)(1)(C) or (D)] for any part of the 12-week period of such leave under such subsection." 29 U.S.C. 2612(d)(2)(B). The Act expressly preserves and encourages more generous leave policies, both those voluntarily adopted by employers and those mandated by state law. 29 U.S.C. 2651-2653.

The FMLA requires employees to give their employers advance notice of foreseeable leave, 29 U.S.C. 2612(e), and allows employers to require medical certification when leave is sought for a serious health condition, 29 U.S.C. 2613. With certain exceptions, the Act entitles employees to job restoration in the same or an equivalent position upon their return from leave, and requires employers to maintain employees' group health benefits while on leave. 29 U.S.C. 2614(a) and (c). It is "unlawful for any employer to interfere with, restrain, or deny the exercise" or attempted exercise of any FMLA right. 29 U.S.C. 2615(a)(1). Either the affected employee or the Secretary of Labor is authorized to bring suit to enforce the Act. 29 U.S.C. 2617 (1994 & Supp. V 1999). Employers are required to post a notice of FMLA rights in a form approved by the Secretary. 29 U.S.C. 2619(a); see 29 C.F.R. 825.300(a). The Secretary has prepared a prototype notice for that purpose, which is reprinted in Appendix C to Part 825 of 29 C.F.R., and which is also available from local offices of the Wage and Hour Division of the Department of Labor (DOL).

b. The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. 2654. Pursuant to that authority, the DOL has promulgated detailed regulations concerning the process by which employers and employees are to communicate with each other regarding FMLA leave. See 29 C.F.R. 825.207(d)(1), 825.208, 825.300-825.312, 825.700(a). Those regulations provide that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided" in Section 825.208 of the regulations. 29 C.F.R. 825.208(a). "The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing," but if it is oral, it must be confirmed in writing by the following payday. 29 C.F.R. 825.208(b)(2). Under Section 825.208, "[o]nce the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 C.F.R. 825.208(b)(1).

The regulations contain a specific provision addressing the substitution of *paid* leave for FMLA leave. Under that provision, "[i]f the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave," or at a later date if the employer initially lacks knowledge of the information necessary to make the designation. 29 C.F.R. 825.208(c). That provision then states that "[i]f the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason * * * and

fails to designate the leave as FMLA leave," and to notify the employee as required by 29 C.F.R. 825.208(b),

> the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 C.F.R. 825.208(c). Another regulation, which applies to both paid and unpaid leave, provides that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. 825.700(a).

The DOL regulations also require the employer to communicate specified information regarding the employee's rights and responsibilities under the FMLA to the employee at the time he requests leave for reasons that trigger the FMLA. 29 C.F.R. 825.301(b). The written notice must state "that the leave will be counted against the employee's annual FMLA leave entitlement." 29 C.F.R. 825.301(b)(1)(i). The notice must also inform the employee of, *inter alia*, "the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution," 29 C.F.R. 825.301(b)(1)(iii); "any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments," 29 C.F.R. 825.301(b)(1)(iv); and "the employee's right to restoration to the same or an equivalent job upon return from leave," 29 C.F.R. 825.301(b)(1)(vii). The required written notice "must be provided to the employee no less often than the

first time in each six-month period that an employee gives notice of the need for FMLA leave." 29 C.F.R. 825.301(c). A prototype notice is contained in Appendix D to Part 825 of 29 C.F.R., and is also available from local offices of DOL's Wage and Hour Division. See 29 C.F.R. 825.301(b)(2).

2. a. On March 17, 1995, petitioner Tracy Ragsdale began her employment with respondent Wolverine Worldwide, Inc. Pet. App. A2. Petitioner was diagnosed with cancer in February 1996, and on February 21, 1996, she requested and received medical leave. *Ibid.* Respondent's leave policy allowed employees with at least six months of service to take leave for up to seven months, on the condition that the employee submit a request for extension of leave every 30 days. *Ibid.* In addition to petitioner's initial request for leave, respondent granted six extensions of leave, the last coming on August 15, 1996. *Ibid.* During that period, respondent did not notify petitioner of her eligibility for leave under the FMLA, nor did it designate petitioner's leave as FMLA leave. *Ibid.* Respondent states in this Court that it was aware of the Act but believed that petitioner was not eligible for FMLA leave because she had not worked for respondent a full 12 months at the time her leave initially commenced. Br. in Opp. 2 n.1.

Neither of the opinions below explicitly states whether petitioner's leave was paid or unpaid. Respondent asserted below (see Resp. C.A. Br. 4) that the leave was unpaid, however, and the opinions of the court of appeals and district court implicitly suggest that petitioner did not continue to receive her regular pay during the leave period. Thus, the court of appeals stated that during the leave, "[respondent] maintained [petitioner's] health insurance benefits, and even exceeded the requirements of the FMLA by paying [petitioner's] insurance premiums for six months. Moreover, [respondent] held [petitioner's] position open for her during the entire thirty weeks of leave." Pet. App. A11; see *id.* at

B7. The absence of any reference to payment of wages indicates the unpaid status of petitioner's leave.

On September 20, 1996, petitioner was terminated because she had exhausted her seven months of company leave and was unable to return to work. Pet. App. A2. On September 26, 1996, petitioner requested additional FMLA leave or, in the alternative, permission to return to work on a reduced hour schedule. *Id.* at A3. Respondent denied both requests. *Ibid.* Petitioner's physician released her to work in December 1996, and she has been employed in full-time positions since December 31, 1996. *Ibid.* The parties appear to have litigated the case on the assumption that petitioner could have returned to work at the expiration of seven months of company leave plus 12 weeks of FMLA leave, had respondent permitted those periods of leave to run sequentially.

b. Petitioner brought suit against respondent, asserting claims under, *inter alia*, the FMLA. Pet. App. B2. The district court granted respondent's motion for summary judgment on the FMLA claim. *Id.* at B4-B9. The court held that petitioner was eligible for FMLA leave as of March 18, 1996, the date on which she requested her first extension of leave, even though she was not eligible on February 21, 1996, when she first took leave, because she had not yet completed 12 months of employment with respondent. *Id.* at B4-B6. The court further held, however, that petitioner was not entitled to 12 weeks of FMLA leave in addition to the seven months of leave she had already received. The court acknowledged that under the DOL regulations, respondent's failure to designate petitioner's leave as FMLA leave would preclude respondent from counting that leave against the statutory 12-week entitlement. *Id.* at B6-B7. The court concluded, however, that the DOL regulations were invalid because they "added requirements which not only go beyond those of the statute, but which are inconsistent with the stated

purpose of the statute and which would grant entitlements which were not given by Congress." *Id.* at B8 (quoting *Cox* v. *AutoZone, Inc.*, 990 F. Supp. 1369, 1381 (M.D. Ala. 1998), aff'd *sub nom. McGregor* v. *AutoZone, Inc.*, 180 F.3d 1305 (11th Cir. 1999)).

c. The court of appeals affirmed. Pet. App. A1-A12. The court concluded that "the DOL's regulations improperly 'convert[] the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave.'" *Id.* at A7 (quoting *McGregor* v. *AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999)). Because the "terms of the statute contemplate only that the employer will be required to provide a 'total' of twelve weeks of unpaid leave," the court stated, "twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires." *Ibid.* The court of appeals recognized that 29 C.F.R. 825.208(a) requires an employer to designate leave, paid or unpaid, as FMLA qualifying and to notify the employee of that designation, and that two separate regulations—29 C.F.R. 825.208(c) (dealing with paid leave) and 825.700(a) (dealing with paid and unpaid leave)—provide that the failure to designate leave as FMLA leave will result in the employee's retaining his 12-week FMLA entitlement. Pet. App. A5-A6. The court also recognized that under 29 U.S.C. 2612(d)(2)(B), which specifically addresses paid leave, "[a]n eligible employee may elect, or an employer may require the employee, to substitute" certain types of accrued paid leave for "any part of the 12-week" FMLA leave. Pet. App. A8. The court concluded, however, that Section 2612(d)(2)(B) does not support the Secretary's regulatory approach across the board. The court stated that "the Secretary of Labor has apparently seized upon the 'employer may require' provision in § 2612(d)(2)(B) to justify the

imposition of a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave." *Id.* at A9.

The court of appeals stated that notice requirements imposed by other provisions of the FMLA "strongly support the view that where Congress desired explicit notice provisions with significant consequences for their violation, it provided for them in the text of the statute." Pet. App. A9 (citing 29 U.S.C. 2612(e)(1), 2614(b)(1)(A)-(B), 2619). The court also relied on portions of the legislative history stating that the FMLA was designed to establish a minimum labor standard for leave, and indicating that the 12-week leave period was a compromise between the family needs of workers and the business needs of employers. *Id.* at A9-A10. The court concluded that "[t]he DOL regulations must be struck down" because they "create rights which the statute clearly does not confer." *Id.* at A10.

The court stated, however, that situations could arise "in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights." Pet. App. A10. As an example, the court pointed out that "notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks." *Id.* at A10-A11 (citing *Longstreth* v. *Copple*, 189 F.R.D. 401 (N.D. Iowa 1999)). The court also recognized that "in some cases where the leave was anticipated, an employer's failure to provide notice that the leave counts against the FMLA entitlement could interfere with the employee's ability to plan and use future FMLA leave." *Id.* at A11.

In the instant case, however, where respondent's leave program was "far more generous than the baseline established by the FMLA," and petitioner's "medical condition

rendered her unable to work for substantially longer than the FMLA twelve-week period," the court of appeals concluded that applying the notice regulations would "directly contradict the statute by increasing the amount of leave that an employer must provide." Pet. App. A11. Under those circumstances, the court found that treating what it characterized as respondent's "technical violation" of the designation regulations "as a denial of [petitioner's] FMLA rights would be an egregious elevation of form over substance; a result clearly not contemplated by the FMLA." *Ibid.* On that basis the court held that 29 C.F.R. 825.700(a) is "invalid insofar as it purports to require an employer to provide more than twelve weeks of leave time." Pet. App. A11.

DISCUSSION

The court of appeals erred in holding invalid a DOL regulation, 29 C.F.R. 825.700(a), that is designed to ensure that employees covered by the FMLA are able to make informed choices concerning the exercise of their statutory rights. The instant case is not an optimal vehicle, however, for deciding whether that regulatory provision is valid. And while the court of appeals' decision is in substantial tension with the ruling of the Sixth Circuit in *Plant* v. *Morton International, Inc.*, 212 F.3d 929 (2000), no square circuit conflict exists, since that case involved *paid* leave and therefore focused on a separate regulation, 29 C.F.R. 825.208(c). The petition for certiorari should therefore be denied.

1. "Where the empowering provision of a statute states simply that the agency may 'make . . . such rules * * * as may be necessary to carry out the provisions of this Act,' * * * the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation and footnote omitted). The FMLA vests the Secretary of Labor

with broad authority to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. 2654. In light of Congress's express conferral of legislative rulemaking authority, a court in applying the Secretary's FMLA regulations "must accord the [Secretary's] assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

The regulation at issue in this case—29 C.F.R. 825.700(a)—complements other regulatory provisions intended to provide employees covered by the FMLA with adequate information concerning their rights and responsibilities under the Act. As we explain above (see p. 2, *supra*), "[e]very employer covered by the FMLA is required to post and keep posted on its premises * * * a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act." 29 C.F.R. 825.300(a). The prototype notice prepared by DOL is cast in general terms and provides a succinct overview of the FMLA's requirements and prohibitions. See 29 C.F.R. Pt. 825 App. C.

Under the regulations, an employer is required to provide an additional notice—notice that is both more comprehensive and somewhat more tailored to the circumstances of the individual worker—at the time that an employee requests leave for an FMLA-covered purpose. See 29 C.F.R. 825.301(b) and (c); Pt. 825 App. D. That regulatory mandate reflects the Secretary's determination that the FMLA's purposes cannot adequately be realized if workers are unaware of their rights and responsibilities under the Act. Recent empirical studies indicate that most employees know too little about the FMLA to be able to take advantage of its protections on their own. Surveys of randomly-selected employees in FMLA-covered establishments in 1995 and

2000 showed that only 59% of those employees had even heard of the Act, a percentage that did not increase between 1995 and 2000. D. Cantor, et al. & U.S. Dep't of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* 3-10 (Jan. 2001). Similarly, a recent survey of human resources professionals suggested that only 29% of employees and 31% of line managers and supervisors understand the FMLA. Society for Human Resource Management, *2000 FMLA Survey* (Jan. 2001).

The Secretary's regulations sensibly require that employees who have actually requested leave for an FLMA-covered reason—and who are therefore especially in need of information regarding the Act's provisions—must receive more detailed and specific notice concerning the Act than is required to be posted for the work force generally. It should be noted, in this regard, that because employers typically provide some form of parental and disability leave, an employee's request for leave for an FMLA-covered reason does not by itself evidence familiarity with the terms of the Act.[1] An understanding of the Act's provisions therefore may substantially assist the worker, who may have rights under the Act (*e.g.*, entitlement to a longer period of leave, and to restoration to the same or an equivalent job) that go beyond the terms of the employer's own leave policy.

As a practical matter, an employee's full understanding of his rights and responsibilities under the FMLA requires an awareness that a particular period of leave will be counted

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[1] The DOL regulations make clear that an employee will be treated as having requested FMLA leave (thereby triggering the notice provisions of 29 C.F.R. 825.301) if he requests leave for an FMLA-covered *reason*. 29 C.F.R. 825.302(c), 825.303(b). "The employee need not expressly assert rights under the FMLA or even mention the FMLA." 29 C.F.R. 825.302(c), 825.303(b). Thus, the request for leave will not necessarily reflect the employee's awareness that the FMLA exists, let alone a thorough understanding of the worker's rights and responsibilities under the Act.

against his 12-week annual entitlement under the Act. The designation and notice requirements contained in 29 C.F.R. 825.208(a), 825.208(c), and 825.700(a)—*i.e.*, the requirements that an employer must determine and inform the employee in advance that a particular leave period will be treated as FMLA leave—are therefore properly understood as part of a larger regulatory effort to make the FMLA's protections meaningful by increasing employee understanding of the Act's provisions. Those requirements impose no onerous burden on the employer. In order to ensure compliance with the Act, the employer must necessarily make its own internal determination whether particular leave periods will be treated as FMLA leave. The regulations at issue in this case simply direct the employer to make that determination at the outset of the leave period (to the extent that is feasible) and to communicate that determination promptly to the affected employee.

The pertinent regulatory provisions also state, as a categorical matter, that particular periods of leave will not be counted against an employee's annual 12-week entitlement under the FMLA if the employer fails to give timely notice that the leave will be so treated. See 29 C.F.R. 825.208(c), 825.700(a). That prophylactic rule will sometimes place the employee in a better position than if the employer had provided the required notice in a timely fashion. In the instant case, for example, the effect of 29 C.F.R. 825.700(a) is to afford petitioner a viable cause of action under the FMLA, even though she would have been physically unable to return to work within 12 weeks if respondent had promptly informed her that her leave would be counted against the FMLA limit. The Secretary has reasonably determined, however, that the predictability and ease of administration of a categorical rule make it preferable to a regime in which an individual's entitlement to relief under the Act would turn on a potentially difficult retrospective inquiry into what

steps the employee might have taken had he received timely notice. Cf. *Mourning*, 411 U.S. at 374 (agency may by rule "require[] some individuals to submit to regulation who do not participate in the conduct the legislation was intended to deter or control," in order to provide "a reasonable margin to insure effective enforcement"). As the agency explained when it promulgated the final rule, the pertinent regulatory provisions were "intended to resolve the question of FMLA designation as early as possible in the leave request process, to eliminate protracted 'after the fact' disputes." 60 Fed. Reg. 2180, 2207 (1995).[2]

2. The court of appeals in this case observed that "[t]he FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires." Pet. App. A7. The court noted as well that "[e]ntirely absent from the text of the FMLA is any indication that the FMLA was designed to entitle an employee to

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[2] The DOL regulations make clear that paid vacation or personal leave provided under an employer's own policies may be counted against the employee's 12-week FMLA entitlement if the leave is in fact used for an FMLA-covered purpose, even if the employee's request for leave does not mention that purpose. The regulations explain, by way of example, that if an employee requests and receives two weeks of paid vacation leave, and suffers a serious injury midway through the two-week period, the employer may designate the second week as FMLA leave and may count that time against the employee's 12-week entitlement. 29 C.F.R. 825.208(d). The potential for confusion, and for disagreement between the employer and employee as to whether particular leave should be counted against the 12-week entitlement, is especially great when the employee's leave request does not explicitly invoke an FMLA-covered purpose. The preamble to 29 C.F.R. 825.208 suggests a particular focus on such situations. See 60 Fed. Reg. at 2207-2208. Sections 825.208(c) and 825.700(a) apply by their terms, however, even in cases like this one, where petitioner's request for leave was explicitly premised on the existence of a serious health problem.

additional leave under the FMLA when the employer's leave plan already provides for twelve weeks of FMLA qualifying leave." *Id.* at A7-A8. The court of appeals found the regulatory provisions at issue in this case to be inconsistent with the balance struck by Congress. That analysis is misconceived.

Nothing in the DOL regulations requires any employer to allow any employee to take more than 12 weeks of leave for an FLMA-covered purpose. Nor do the regulations make such a requirement a necessary or even likely consequence of an employer's decision to adopt its own leave program. To limit an employee's leave entitlement to the 12 weeks specified by the Act, an employer need only provide timely notice that a particular period will be counted as FMLA leave. Absent any reason to believe that compliance with that requirement will be difficult or onerous–and the court of appeals offered none—the court erred in concluding that the Secretary's regulatory approach would subvert the balance struck by Congress.

The FMLA states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter [29 U.S.C. 2611-2619]." 29 U.S.C. 2615(a)(1). The expert agency has reasonably concluded that an employee's informed exercise of FMLA rights requires prior notice that particular periods of leave will be counted against the worker's 12-week statutory entitlement. An employer that treats particular periods as FMLA leave after failing to provide the requisite notice may properly be said to "interfere with" or "restrain" the employee's exercise of his rights under the Act, even though the employee receives 12 weeks of leave.

Indeed, the court of appeals in this case "stressed that the court [wa]s not holding that any DOL regulations requiring employers to designate leave as FMLA leave would be

invalid." Pet. App. A10. The court observed, by way of example, that "notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks." *Id.* at A10-A11. Even in that situation, however, the effect of the challenged regulations is to require the employer to allow more than 12 weeks of leave for an FMLA-covered reason, based on the employer's non-compliance with the regulatory notice requirement. Thus, the court of appeals' decision ultimately rests on the fact that the Secretary has chosen to promulgate a categorical rule, rather than to mandate a case-specific inquiry into whether a particular employee suffered actual prejudice as a result of the employer's failure to provide timely notice. But while the Secretary might have adopted a regime of the sort the court of appeals preferred, she was not required to do so. Given the breadth of the Secretary's rulemaking authority under the Act (compare *Mourning*, 411 U.S. at 369-378), and the evident desirability of avoiding difficult retrospective inquiries into the presence or absence of prejudice in individual cases (see pp. 12-13, *supra*), the agency acted within its sphere of lawful discretion in proceeding by way of a prophylactic rule.

3. At the time that petitioner initially requested leave, she had worked for respondent for less than a year and therefore was not an "eligible employee" within the meaning of the FMLA. See 29 U.S.C. 2611(2)(A)(i) ("eligible employee" must have been "employed * * * for at least 12 months by the employer with respect to whom leave is requested"); see also Pet. App. B4. In the district court, respondent contended that petitioner's "eligibility for FMLA leave must only be determined on the date that leave first commenced," and that her FMLA claim should be dismissed

on that ground. *Ibid.* The district court rejected that argument, holding that petitioner had become an "eligible employee" by the time that she submitted her first request for extension of leave and accordingly was entitled to the protections of the Act. See *id.* at B4-B6.

The district court's holding was correct. See 29 C.F.R. 825.110(b) ("If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer * * *, the week counts as a week of employment" in determining whether the individual has been "employed" by the employer for the requisite 12 months.). The circumstances described above mean, however, that the notice question arises here in an atypical factual context. The pertinent DOL regulations direct the employer to designate leave as FMLA leave either at the time that leave is requested, or at such later time as the employer acquires new information indicating that leave has been taken for an FMLA-covered reason. See, *e.g.*, 29 C.F.R. 825.208(c) (stating, with respect to paid leave, that "[t]he employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced"). The regulations do not specifically contemplate (and we are aware of no other judicial decision addressing) the situation presented here, where the notice requirement was triggered neither by the initial leave request, nor by the acquisition of new information bearing on the reasons for which leave was taken, but by petitioner's newly acquired status as an "eligible employee."

4. Petitioner contends (Pet. 11) that the court of appeals' decision in this case "is in direct conflict with" the Sixth Circuit's decision in *Plant* v. *Morton International, Inc.*, 212 F.3d 929 (2000). In our view, although there is considerable

tension between the two decisions, there is no square conflict.[3]

In *Plant*, an employee suffered a workplace injury on April 26, 1996, and thereafter took paid disability leave. 212 F.3d at 932. His employment was terminated on June 7, 1996. *Ibid.* Thus, if Plant was in fact dismissed from employment based on his disability and ensuing leave (an allegation that the company denied, see *id.* at 932-933), there was no dispute that the company had failed to provide the 12 weeks of leave mandated by the FMLA. The company contended, however, and the district court agreed, that Plant was not entitled to relief under the FMLA because he would have been physically unable to return to work until August 5, 1996—more than 12 weeks after his injury—even if he had not been fired at an earlier time. *Id.* at 934.

The Sixth Circuit rejected that argument on the ground that the employer had "never informed Plant that it was counting his paid absence against the statutory FMLA allowance," and that under 29 C.F.R. 825.208(c) Plant's 12-week leave entitlement under the Act had therefore never begun to run. 212 F.3d at 934-935. The Sixth Circuit concluded that

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[3] Neither *Manuel* v. *Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995), nor *Cline* v. *Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998), also cited by petitioner (see Pet. 13-14), conflicts with the court of appeals' decision in this case. The court in *Manuel* considered and approved DOL regulations providing that an employee may effectively invoke the protections of the FMLA by requesting leave for an FMLA-covered reason, even if he does not mention the Act. 66 F.3d at 761-763; see note 1, *supra*. Although the court briefly noted the employer's duty under the DOL regulations to designate leave as FMLA-qualifying, see 66 F.3d at 762, it did not discuss either 29 C.F.R. 825.208(c) or 29 C.F.R. 825.700(a). The court in *Cline* did apply Section 825.700(a), see 144 F.3d at 300-301 & n.1, but the employer in that case did not contest the validity of the regulation. Although petitioner relies in part on those decisions, she acknowledges (Pet. 14) that "neither *Cline* nor *Manuel* directly addressed the validity of the regulations at bar."

> § 825.208(c) evinces a reasonable understanding of the FMLA, reflecting Congress's concern with providing ample notice to employees of their rights under the statute. * * * Moreover, because the FMLA was intended to set out *minimum* labor standards, we do not believe that § 825.208(c) is inconsistent with legislative intent merely because it creates the possibility that employees could end up receiving more than twelve weeks of leave in one twelve-month period, due to an employer's failure to notify them that the clock has started to run on their allotted period of leave.

Id. at 935-936.

Plant is distinguishable from the instant case on two bases. First, the employer in *Plant* dismissed the plaintiff less than 12 weeks after the plaintiff's leave commenced. The court did not—as in this case—award additional leave as a result of the employer's failure to give prior notice that Plant's leave would count against his FMLA entitlement, but rather relied on that failure only in rejecting the employer's contention that no FMLA violation had occurred because Plant would have been physically unable to return to work at the conclusion of a 12-week leave period. Second, the employee in *Plant* requested and received *paid* leave, and the Sixth Circuit's decision focused primarily on 29 C.F.R. 825.208(c), which addresses only paid leave. In the instant case, the opinions below rather strongly suggest, though they do not expressly state, that petitioner's leave was unpaid, see pp. 5-6, *supra*, and the Eighth Circuit in the end invalidated only 29 C.F.R. 825.700(a), which addresses both paid and unpaid leave. Pet. App. A11. Indeed, in identifying the other judicial decisions that have addressed the DOL regulations, the court of appeals in this case described the Sixth Circuit's decision in *Plant* as "distinguishing between notice requirements for paid as opposed to

unpaid leave," while also noting that the Sixth Circuit "appear[ed] to uphold both 29 C.F.R. §§ 825.208(c) and 825.700(a) as valid exercises of regulatory power." Pet. App. A11. Because the FMLA provides an entitlement only to unpaid leave, see 29 U.S.C. 2612(c), and because the Act itself contains a specific subsection (29 U.S.C. 2612(d)) addressing the substitution of paid leave for leave provided under the FMLA, the judgment that underlies 29 C.F.R. 825.208(c) and 825.700(a)—*i.e.*, that an employee who requests leave for an FMLA-covered purpose may be unaware that the leave will count against the 12-week FMLA entitlement—may apply with somewhat greater force when the employee requests paid leave.

For the foregoing reasons, we do not believe that the court of appeals' decision in this case squarely conflicts with the Sixth Circuit's decision in *Plant*. There is, to be sure, considerable tension between the two decisions. Although the employee in *Plant* was dismissed less than 12 weeks after the commencement of leave, the Sixth Circuit's decision does not suggest that its approval of the regulatory notice requirement was dependent on that fact. The court in *Plant* did attach significance to the fact that the case involved paid leave: it distinguished its prior decision in *Cehrs* v. *Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998), on the ground that "the employee in *Cehrs* had taken unpaid leave rather than paid leave; therefore, the court had no occasion to address § 825.208(c), which appears to govern only those cases in which an employer wishes to designate paid leave as FMLA leave." 212 F.3d at 935 (citation omitted). However, the court of appeals in *Plant* recognized that 29 C.F.R. 825.700(a) "prescribe[s] almost identical notice rules when employers wish to designate unpaid leave as FMLA leave," 212 F.3d at 935 n.1, and it expressed its disagreement with several other decisions that held that 29 C.F.R. 825.208(c) and 825.700(a)

were in conflict with the FMLA's creation of an entitlement to 12 weeks of leave, "conclud[ing] that those regulations are valid and forbid employers from retroactively designating FMLA leave if they have not given proper notice to their employees that their statutory entitlement period has begun to run," 212 F.3d at 936.

5. Issues concerning the Secretary's implementation of the FMLA may ultimately warrant resolution by this Court. On balance, however, we believe that the petition for certiorari in this case should be denied. We agree that considerable tension exists between the court of appeals' decision in this case and the Sixth Circuit's decision in *Plant*. In the end, however, we believe that because this case appears to involve unpaid leave and *Plant* involved paid leave, and because for that reason the decisions focus on separate regulations, the difference in the result in the two cases is not such as to warrant review by this Court at the present time. The anomalous factual circumstances involved in this case, moreover, make it a less than optimal vehicle for resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

TRACY RAGSDALE,

Petitioner,

v.

WOLVERINE WORLD WIDE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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12/22/1997	1	COMPLAINT; Summons issued and returned to: atty for service. ($150.00 filing fee paid – receipt no. 100-11943) [Date Entered: 12/22/97, By: tm]
		* * *
02/27/1998	6	ANSWER by deft Wolverine Worldwide [Date Entered: 03/02/98, By: jt]
		* * *
04/10/1998	10	AMENDED complaint w/Jury Demand by pltf [Date Entered: 04/10/98, By: jt]
04/21/1998	11	REQUEST by plaintiff Tracy Ragsdale for Admissions. [Date Entered: 04/21/98, By: mf]
		* * *
06/01/1998	14	SECOND REQUEST FOR ADMISSIONS by plaintiff Tracy Ragsdale [Date Entered: 06/01/98, By: tm]
		* * *
06/29/1998	21	MOTION by pltf for partial summary judgment [Date Entered: 06/30/98, By: jt]
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* * *

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* * *

07/16/1998 30 SECOND AMENDED complaint by pltf Tracy Ragsdale adding Warren E Dupwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate; terminating Corporation X; Jury Demand [Date Entered: 07/16/98, By: jt]

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* * *

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* * *

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* * *

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10/12/1998 56 RESPONSE by plaintiff Tracy Ragsdale to deft's statement of undisputed material facts [35-1] [Date Entered: 10/14/98, By: mf]

* * *

11/03/99 65 ORDER by Judge James M. Moody denying pltf's motion for partial summary judgment [21-1]; granting deft's cross-motion for partial summary judgment [33-1]; granting deft's second cross-motion for partial summary judgment [47-1]; finding motion to continue [57-1] moot; judgment to be entered dismissing pltf's claims in their entirety EOD: 11/4/98 (cc: all counsel) [Date Entered: 11/04/98, By: jt]

11/03/1998 66 JUDGMENT: by Judge James M. Moody, pursuant to Order granting summary judgment with respect to each remaining claim set forth in pltf's Second Amended Complaint, pltf's complaint is dismissed with prejudice in its entirety; terminating case EOD: 11/4/98 (cc: all counsel) [Date Entered: 11/04/98, By: jt]

11/13/1998 67 MOTION (FILED IN LITTLE ROCK) by plaintiff Tracy Ragsdale to vacate Court order [65-1] [Date Entered: 11/18/98, By: tm]

11/13/1998 68 MEMORANDUM (FILED IN LITTLE ROCK) by plaintiff Tracy Ragsdale in support of motion to vacate Court order [65-1] [67-1] [Date Entered: 11/18/98, By: tm]

* * *

12/04/1998 71 RESPONSE by defendant Wolverine Worldwide to pltf's motion to vacate Court order (to alter or amend [65-1] [67-1] [Date Entered: 12/04/98, By: mf]

07/06/1999 72 NOTICE by plaintiff Tracy Ragsdale of filing supplemental brief [Date Entered: 07/06/98, By: tm]

08/05/1999 73 ORDER by Judge James M. Moody denying pltf's motion to vacate or amend Court order [65-1] [67-1] (cc: all counsel) [Date Entered: 08/05/99, By: tm]

08/10/1999 74 SUPPLEMENTAL RESPONSE by defendant Wolverine Worldwide to pltf's motion to alter or amend the Court 11/3/98 Order. [Date Entered: 08/10/99, By: mf]

08/11/1999 75 NOTICE of appeal by plaintiffs Warren E Dupwe, Tracy Ragsdale from District Court decision [65-1], [66-2], (73-1] (appeal fees paid) (2 certified copies to clerk 8USCA), (cc: counsel) [Date Entered: 08/12/99, By: dc]

* * *

09/14/2000 76 Opinion (8USCA) [Date Entered: 09/14/00, By: dc]

09/14/2000 77 MANDATE from 8 USCA affirming the decision of the District Court [75-1] [Date Entered: 09/14/00, By: dc]

09/22/2000 78 NOTICE by plaintiff Tracy Ragsdale of filing a petition for a writ of certiorari

with Supreme Court #00-6029 [Date Entered: 09/25/00, By: dc]

07/23/2001 79 LETTER to court from Supreme Court, the motion for leave to proceed in forma pauperis is granted and the petition for a writ of certiorari are granted [Date Entered: 07/25/01, By: dc]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE, Plaintiff,	)	
VS.	)	NO. J-C-97-475
WOLVERINE WORLDWIDE, INC., d/b/a FROLIC FOOTWEAR, A FOREIGN CORPORATION DOING BUSINESS IN THE STATE OF ARKANSAS, Defendant.	)	

DEPOSITION OF
TRACY RAGSDALE
June 5, 1998

JENNY BURKS, COURT REPORTER
RIVERSIDE REPORTING SERVICE
Suite 303 - 24 North Second
Memphis, Tennessee 38103
(901) 527-1100

RIVERSIDE REPORTING SERVICE

[2] The deposition of TRACY RAGSDALE, taken on behalf of the Defendant, on this, the 5th day of June, 1998, pursuant to notice and consent of counsel, beginning at approximately 10:25 a.m., in the Law Offices of Barrett & Deacon, 300 South Church Street, Jonesboro, Arkansas.

This deposition is taken pursuant to the terms and provisions of the Federal Rules of Civil Procedure.

All forms and formalities, excluding the signature of the witness, are waived, and objections alone as to matters of incompetency, irrelevancy and immateriality of the testimony are reserved, to be presented and disposed of at or before the hearing.

[3] APPEARANCES

FOR THE PLAINTIFF: LUTHER O'NEAL SUTTER, ESQ.
Harrill & Sutter
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Little Rock, Arkansas 72221

FOR THE DEFENDANT: RICK BENNETT, ESQ.
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Suite 2560
One Commerce Square
Memphis, Tennessee 38103

ALSO PRESENT: Bob Smith

* * *

[14] River Vo-tech in Pocahontas for a year.

Q. What kind of course did you take there?

A. Accounting, math, English, computer.

Q. Okay. Are you currently working?

A. Yes.

Q. Where are you work now?

A. S. B. Power Tools in Walnut Ridge

Q. Esby's?

A. S. B.

Q. Power Tools. In Walnut Ridge?

A. Yes, sir.

Q. What do you do there?

A. I assemble jig saws.

Q. That's a manufacturing facility, I take it?

A. They make power drills, jig saws.

Q. How long have you been there?

A. A month.

Q. How did you come to get this job?

A. They ran an ad in the paper and I went to the unemployment office and filled out an application.

Q. What paper did you see the ad in?

A. Times Dispatch at Walnut Ridge.

Q. Okay. What's your rate of pay there?

A. $5.75 an hour.

Q. Do they have any production incentives?

[15] A. No, Sir.

Q. Do you have any benefits?

A. Not yet.

Q. Okay. I take it after you've –

A. After I'm there nine months I get insurance, dental, vision and stuff like that.

Q. After termination of your employment with Frolic Footwear, tell me when you next went to work?

A. December 31st, 1996 I went to work at B. J.'s Quick Shop in Imboden.

Q. What did you do there?

A. Cashier, cook.

Q. How long were you there?

A. Until may of '89, the first of May.

Q. And you left there to go to work for the –

A. S. B. Power Tools.

Q. Okay. How many hours a week approximately did you work at B. J.'s Quick Shop?

A. For the first two months it was like part-time like about twenty hours. And then after that, probably February, I went full time.

Q. Why was it part-time initially?

A. Because I didn't think I was up for forty hours yet.

Q. Why was that?

[16] A. Because I had lost so much weight taking radiation I didn't have very much energy.

Q. Between August, do you remember your termination date from Frolic Footwear?

A. I want to say it was August 26th. If I didn't come back that day then not to come back is what they said.

Q. From August 26th of '96 until December 31 of '96 when you went to work at the quick shop did you seek employment anywhere during that period of time?

A. No, sir. My doctor, Dr. Lynch, told me not to go back to work right yet to try to rebuild my strength.

Q. Okay. And it wasn't, I take it then it wasn't until December before he released you to return to work?

A. Yes, sir.

Q. Okay. And at that time I guess he told you to try to do it part-time or light duty or something, I take it?

A. He told me in August I could, but I didn't -- like he told me I could go back to Frolic four hours a day. And my supervisor, Teresa Stinnett, said no, if I couldn't come back the hours they were working not to come back.

[17] Q. Did he give you any documentation to that effect that you could come back four hours a day?

A. I think he's got it in his file.

Q. Did you bring anything and give it to Teresa Stinnett at that time?

A. No. We just told her and she said it didn't matter. She said if I couldn't come back and work the hours they were working not to worry about it.

Q. And when did you have this discussion with Teresa?

A. The Thursday or Friday before the 26th.

Q. And Teresa Stinnett is whom?

A. My supervisor.

Q. And she's at the Walnut Ridge plant?

A. Yes.

Q. Okay. Did you talk with anyone else at Frolic that day other than Teresa?

A. No, sir.

Q. Was anyone with you when you went over there –

A. My mother.

Q. – and spoke to Teresa? Your mother?

A. Yes.

Q. That would be Mrs. Malone?

[18] A. Yes, sir.

Q. Who's present here today, correct?

A. Yes, sir.

Q. Why did you go in to talk to Teresa on the day that you did?

A. To get another sick leave paper.

Q. Okay.

A. For the doctor to fill out. And she said I couldn't have no more.

Q. What did she tell you?

A. If I couldn't come back the 26th not to come back.

Q. And she's the one who told you that day?

A. (Witness nods head affirmatively).

MR. SUTTER: You've got to –

A. Yes, sir.

MR. SUTTER: You have to say something.

A. I'm sorry. Yes, sir.

Q. Tell me, to the best of your ability to recall, Mrs. Ragsdale, exactly what Ms. Stinnett told you when you asked for the additional leave slip?

A. She said that my time was up, if I didn't come back not to come back.

Q. And what did you say?

A. I told her okay. I'd call my doctor. And [19] he said no.

Q. Okay. What did you call your doctor and ask?

A. If I could return back to work full time.

Q. What about this four hour business, did you talk to Ms. Stinnett about that at this time?

A. Yes. The doctor asked me to ask them. He would release me for four hours, but not full time.

Q. That's okay, Mrs. Ragsdale. Mrs. Ragsdale, if you need to stop at any point in time, you just tell me and that's all right. Okay?

A. Okay.

Q. Now, did you and her discuss the four hours at that time?

A. Yes, sir.

Q. Okay. Tell me about, to the best of your knowledge, the extent of that conversation?

A. I told her that the doctor would release me to come back four hours to see if I can do it or build up to a full hour day. And she said, no, that the policy was if I couldn't come back the hours they were working, not to worry about it, not to come back.

Q. Okay. Now, did you have any conversation on that with Mr. Gene Cook?

A. No.

[20] Q. Did you have any conversations at that time or after that date with Mr. Cook about coming back to work?

A. No.

Q. Did you ever have any conversations at that time or after that date with Mr. Cook about coming back to work?

A. No.

Q. Okay. Did you ever sit down with anyone and discuss possible jobs that you could do where you could come back on a four hour basis or a light duty basis?

A. Teresa said we didn't have none.

Q. So you all didn't discuss it any further than that?

A. No.

Q. Did you have any other conversations with Teresa or any other Frolic employee other than this conversation you just related to me about coming back to work on a light duty basis or a reduced hour basis?

A. No.

Q. That was the only time that you all discussed that?

A. Yes, sir.

Q. Okay. And at that time you didn't have a [21] note with you from your physician, as I understand it?

A. No. I come to get a leave paper for him to fill out and she couldn't give me one.

Q. Okay. Did she tell you that you had exhausted your leave under the Frolic policy?

A. Yes, sir.

Q. After this conversation you had with Ms. Stinnett, sometime shortly before August the 26th, 1996 is the best I can get it, you said Thursday or Friday before that date?

A. Yes, sir.

Q. Did you have any other conversations with Ms. Stinnett after that one, either in person or on the phone?

A. No, sir.

Q. Okay. After this, after the termination of your employment with Frolic did you attempt to find any

employment on a reduced hour scale or a light duty basis? Did you look for any –

A. No, sir.

Q. Okay. At least not until December of 1996?

A. That's right.

Q. Okay. Do you recall when you first started working for Frolic?

A. March of '95.

* * *

[24] Q. Is this your first marriage?

A. Yes, sir.

Q. And on this employment application it says that you were laid off from Brown Shoe, is that correct?

A. Yes, sir.

Q. And that you were laid off from S & B Power Tools, is that correct?

A. Yes, sir.

Q. It shows that you were laid off from Coastal C-Mart, is that correct?

A. I went to work at Frolic and quit Coastal.

Q. Okay. When you were first hired at Frolic, do you remember what your position was?

A. Hammer, hammerer.

Q. Hammerer. Okay. What department?

A. Fitting.

Q. Who was your supervisor?

A. Teresa Stinnett.

Q. Is that the position you held throughout your employment with Frolic?

A. No.

Q. Okay. What did you do after that position?

A. I can't remember what it was called. And then I went to – what was it – I put the heel in the [25] back of the shoe and pressed it.

Q. Okay.

A. And that's where I was when I went on sick leave.

Q. That was the position you had when you went on sick leave?

A. (Witness nods head affirmatively).

Q. Yes?

A. Yes.

Q. Okay.

MR. BENNETT: Let's mark this as Exhibit 2.

(Whereupon, Exhibit 2 was marked)

Q. I'll pass this over to you and your counsel, Mrs. Ragsdale, and let you take a look at that document. Do you recognize that document, Mrs. Ragsdale?

A. Yes.

Q. It appears to be an orientation checklist from when you were initially hired?

A. Yes.

Q. Is that your signature on the second page?

A. Yes.

Q. Do you recall Ms. Stinnett going over these things with you right after you were hired?

* * *

[28] know.

Q. Okay. Did you ever see a copy of the collective bargaining agreement?

A. No, sir.

Q. Okay. Did you ever see the shop rules?

A. I don't know.

MR. BENNETT: Let's mark that as the next exhibit.

(Whereupon, Exhibit 6 was marked)

Q. I'll show you and your counsel what's been marked as Exhibit 6. Do you recognize Exhibit 6 as the shop rules, Mrs. Ragsdale?

A. Yes.

Q. Okay.

MR. BENNETT: Mark that as Exhibit 7.

(Whereupon, Exhibit 7 was marked)

Q. I'll hand you and your attorney what's been marked as Exhibit 7, an employee bulletin posted and see if you recognize that, Mrs. Ragsdale?

A. No, I don't recognize it.

Q. Okay. That's fine. Did the company have a bulletin board where they posted notices?

A. Yes.

Q. Did you ever look at that bulletin board on occasion?

[29] A. Yes.

Q. Okay. And it is your testimony that you never saw that on the bulletin board?

A. Yes.

Q. Okay. Have you ever seen that document before today anywhere?

A. Yes, Skil.

Q. Excuse me?

A. Skil, ~~Skil's~~ got it posted.

Q. Skil?

A. S. B. Power Tools.

Q. Okay.

MR. BENNETT: Let's mark this as the next numbered exhibit.

(Whereupon, Exhibit 8 was marked)

Q. I'll slide what's been marked as Exhibit 8 over to you and your counsel and see if you recognize this collective group of documents, Mrs. Ragsdale?

MR. SUTTER: Counsel, did these documents come out of her personnel file?

MR. BENNETT: Yes.

MR. SUTTER: Off the record.

(Brief Recess)

Q. Mrs. Ragsdale, you've had an opportunity to look over Exhibit 8, which are some documents that are [30] styled, Application for Sick Leave?

A. Yes.

Q. Do you recognize these documents, Mrs. Ragsdale?

A. Yes.

Q. Let's just go through them because I just want to identify them for the record. The first one, I think we've got them numbered or lettered each page in the lower right hand side, A, B, C, whatever. Exhibit 8, page A is an application for sick leave and that appears to be dated. Is that your signature on that page?

A. Yes.

Q. Okay. And did you date it the 21st of February?

A. Yes.

Q. Okay. On page B, is that your signature as well about middleways?

A. Yes, sir.

Q. Okay. Page C, your signature appears about middleways of that page. Is that your signature as well?

A. Yes.

Q. Okay. And page D, appears to be a doctor's note of some type. And I think it actually should be

* * *

[36] there?

A. I don't know.

Q. That's not your handwriting there?

A. No.

Q. Okay. And page N, looking at Roman numeral one, that section, who filled that section out?

A. I did.

Q. Okay. I think that's all I had to ask you about that particular document. We can set that down.

MR. SUTTER: I'm sorry. Rick, I have to go to the bathroom.

(Brief Recess)

Q. Mrs. Ragsdale, Exhibit 8 again. It appears that you first applied for Frolic sick leave on 2/21/96. That's the date on page A. Do you see that?

A. Yes, sir.

Q. Do you recall if that's about the time you went out on leave?

A. Yes, sir.

Q. Who did you speak with at this time in February of '96?

A. Teresa Stinnett.

Q. Okay. And did she tell you the procedure for filling out the sick leave?

A. Yes, sir.

* * *

[40] Q. Okay. During the course of your sick leave did you have any conversations with Ms. Stinnett or anyone about returning to work, anyone at Frolic about returning to work?

A. No, sir.

Q. Okay. During the same time period, during the February of '96 until August of '96, the period of time were you on sick leave, did you have any discussions with Ms. Stinnett or anyone else with Frolic about family medical leave?

A. No, sir.

Q. Okay. On the conversation you had with Ms. Stinnett sometime in August of 1996, towards August, near August 26th of 1996 in that conversation was there any mention of family medical leave?

A. My mother asked her about it because Skil or S. B. Tools gave it to her. And Teresa said she had never heard of it. So they asked the secretary and she had never heard of it. So they went and asked Gene Cook and he

said, well, he didn't know. He'd have to find out something about it.

Q. Okay. Did anyone ever get back to you about it?

A. No, they never did call me.

Q. Okay. So there was no other discussion [41] about it whatsoever other than that?

A. No, sir.

Q. Do you recall in February of 1996 before you took off on sick leave missing some days of work in the early part of February?

A. The 12th I went to the doctor and that's when he found the spot. But if I missed I always brought a note from the doctor.

Q. Okay. Do you recall if you missed any other time for any other ailments?

A. If I missed, I'd either have, it would be because my daughter had to go to the doctor or I did.

Q. Okay. Looking again at Exhibit 8, if you would, page L. That's one Dr. Lynch signed dated 7/19 of '96. It has written in here Hodgkin's Disease stage 2A. Do you see that?

A. Yes.

Q. What does that mean, if you know?

MR. SUTTER: Objection, calls for a medical conclusion.

MR. BENNETT: I'm asking her if she knows.

A. Hodgkin's Disease is cancer of your lymph nodes, but I don't know about the stage.

Q. Dr. Lynch never discussed that or you never

* * *

[43] Q. Okay. Did anyone at Frolic call you back then after that and tell you you had been terminated?

A. No, sir.

Q. Okay. Did they send you anything in writing telling you that?

A. Yes, sir.

Q. Okay. Do you remember why they told you you had been terminated?

A. For not showing up to work on the 26th.

Q. Of August?

A. Yes.

Q. In other words, you had exceeded the sick leave?

A. I had exceeded the sick leave.

Q. Okay.

MR. BENNETT: Let's mark that as Exhibit 9.

(Whereupon, Exhibit 9 was marked)

Q. I'll pass what's been marked as Exhibit 9 to you and your counsel and see if that's the letter that you recall receiving from Frolic. Looking at Exhibit 9, Mrs. Ragsdale, and disregarding some of the handwritten notes that obviously wasn't on the copy that was sent to

you, do you recall getting this letter from Mr. Smith dated October the 3rd of 1996?

* * *

[46] answer his question.

A. What was it?

Q. You don't recall Exhibit 12, is that what you were saying?

A. Yes.

Q. Okay. I was asking you, did you make any efforts to try to continue your health insurance with Frolic Footwear after the termination of your employment?

A. I couldn't afford to.

Q. Did you contact the company?

A. No.

Q. How do you know you couldn't afford to?

A. Because of these prices.

Q. And you're referring to the document that's been marked –

A. 10.

Q. – Exhibit 10?

A. Yes.

Q. When you moved in August of '96 or whenever it was that you moved, did you inform the company that you had moved?

A. Yes, sir.

Q. Okay. Do you recall what the job, what your job duties entailed at Frolic when you left the [47] job that you had at the time you went on leave?

A. What it consisted of?

Q. Yes, what your job duties were.

A. You took a shoe. It wasn't put together. And you had to pull the back and the inside apart, stick a plastic, heat a plastic piece up and stick it in there and then press it.

Q. Okay. Did you have to do any lifting as part of that job?

A. Just off the line and put it back on.

Q. You're talking about a shoe itself?

A. A box of shoes.

Q. A box of shoes. Do you know how much the box weighed, approximately?

A. Approximately ten, fifteen pounds.

Q. Okay. And you'd have to lift it from the floor, I take it, up to how high?

A. Yes, sir, probably about the table.

Q. Okay. And were you standing the whole time?

A. Yes, sir.

Q. Okay. And this is, I take it a repetitive movement type job, put that shoe in, take it out, just keep doing that?

A. Yes, sir.

* * *

[49] Q. Do you remember when you started taking radiation?

A. May or June, I'm not really for sure.

Q. And how long did you take radiation, Mrs. Ragsdale?

A. Up until August.

Q. The first of August or the end of August or do you recall?

A. I think it was the second week in August.

Q. Okay. And how many times a week did you have to take your radiation?

A. Five.

Q. Five times a week?

A. Yes, Monday through Friday.

Q. Every week through the second week of August?

A. I had two weeks off.

Q. Oh, in that span?

A. Yes.

Q. Okay. And Hodgkin's Disease, is that the official diagnosis of what you had, to your knowledge?

A. Yes, sir.

Q. Okay. Are you still being treated for that today?

A. No, sir.

[50] Q. Did you ever have an operation to remove this spot on your lung?

A. No, sir. They took my spleen out to see if it was in there but they never, they just biopsied the lung spot.

Q. Okay. And then treated it with radiation?

A. Yes, sir.

Q. Okay.

MR. BENNETT: Hold on a second. We may be getting through with Mrs. Ragsdale, Luther.

MR. SUTTER: Okay. (Brief Recess)

Q. Mrs. Ragsdale, let's go back on the record. You indicated that it was August the 26th of 1996 when they told you your leave expired and you'd been terminated, correct?

A. Yes.

Q. Looking at Exhibit 8. It looks like to me that your leave, looking at pages N and O, was granted through September the 20th. Do you see that?

A. Yes. I made a mistake. It was September 26th when – I'm sorry.

Q. Instead of August?

A. Instead of August.

Q. So everything, when we were talking about [51] August should have been September?

A. Yes, sir.

Q. Okay. That's fine. I just wanted to make sure that we get that clarified. That's fine. I was reading the number wrong myself. All right. Do you remember when you came in at this now September 26th time if you went to the bulletin board at that point in time and looked at job vacancies that were posted up there to see if there was anything you could do?

A. No, sir.

Q. Do you remember if they ever took you up to that bulletin board?

A. No, sir.

Q. Not after your employment was terminated you never did that?

A. No, sir.

Q. Do you have any notes or diaries or anything like that you took or made during the course of this sick leave?

A. No, sir.

Q. Any notes or anything you may have made subsequent to being terminated about this case?

A. No, sir.

Q. Did you make any taped conversations of anything with Ms. Stinnett or anyone else at Frolic

• • •

[53] Q. Okay. You state in Paragraph 18 of that Complaint, amended Complaint, that Frolic created a hostile work environment. What type of hostile work environment are you referring to there?

MR. SUTTER: We'll dismiss that claim.

MR. BENNETT: Okay.

Q. You also stat [sic] in Paragraph 18 –

MR. BENNETT: Are you talking about all of eighteen or just that portion?

MR. SUTTER: No, just the hostile work environment claim.

Q. You also state in Paragraph 18, Mrs. Ragsdale, that they treated you differently than similarly situated non-disabled employees. What is your basis for that?

A. Because they had some people that they would just work like four hours a day, but when I asked they said no.

Q. Who did they work just four hours a day that you're aware of?

A. I don't know the lady's name.

Q. Do you know her first name, middle name, nickname, anything?

A. No. She was just an old lady and she was about to retire, so they just let her work so many, [54] like two or three hours a day and then she'd go home. And the next day she'd come in and work two or three hours and she'd go home.

Q. Okay. And what job did she hold?

A. It was towards the back of the fitting room.

Q. Can you describe her for me physically?

A. No.

Q. Tall, short, fat, thin?

A. Not tall, not short, kind of middle, kind of chunky, gray-haired, that's about all I can remember.

Q. Do you know if she has a disability or anything?

A. She was always sick.

Q. Besides her, do you know anybody else they let work shortened hours?

A. Just like hearing people talk about people they let do that.

Q. What did you hear?

A. That if – I heard just that if you were sick Teresa would let you come in and work like part-time so you could keep your insurance and stuff up.

Q. Part-time meaning reduced hours?

[55] A. Yes, sir.

Q. Do you know of anybody she did that too [sic]?

A. I just heard the other girls talking about it.

Q. Who told you this?

A. Just some of the girls. I mean, I just had two or three that I worked with her that I talked to.

Q. Okay. What are their names?

A. These weren't the ones that we heard – like if we sat outside and smoked there was a bunch of us, but we didn't communicate with everybody so I didn't know everybody's name.

Q. People that you associated with, would they have told you this, that Teresa had done this?

A. No.

Q. Would it have been somebody else?

A. They started about the time I did.

Q. No, I'm not talking about – so it would have been somebody that was there when this happened you're saying?

A. Yes.

Q. All right. Give me the names of your friends that had been hanging out with you, what were their names?

A. Denise Forrest.

[56] Q. Forrest?

A. Uh-huh.

Q. Excuse me?

A. Yes.

Q. Denise Forrest.

A. Vivian Summer.

Q. Okay.

A. Peggy Grant, and then there was a girl named Linda. I don't know her last name.

Q. You understand this is a pretty serious allegation you're making, Mrs. Ragsdale. And I need to find out, if you were told these things, who actually told these things to you. And I need names to substantiate what you're saying actually occurred, okay, so I'm just trying to locate the names of these people. So you don't have any idea who may have told you that Teresa would let people come in on reduced hours?

A. No, I didn't know them.

Q. Do you know what they looked like?

A. No, I don't. I mean, I didn't pay much attention to them. We had just overheard them talking.

Q. Do you have a copy or have you provided your attorney copies of all medical bills resulting [57] from this cancer that caused your sick leave?

A. Yes. He's got some of them and I've still got to get him some.

Q. Okay. Do you know how much you had to pay for medical expenses after the date of your termination from Frolic?

A. When I filed bankruptcy I'd say my medical bills was between $50,000 and $100,000.

Q. Mr. Sutter has that information though?

A. He's got most of it. And I will get him the rest of them.

Q. Okay. Do you know what your wage rate was at the time of your termination from Frolic?

A. It was piecework, so it varied. I was probably making about $6,00, $6.50 an hour.

Q. Okay. Look at Paragraph 39 of your Complaint. You state that Frolic discriminated against you by retaliating against you for requesting an accommodation. What accommodation did you request?

MR. SUTTER: I'm going to object to that as calling for a legal conclusion because of the word accommodation. If you can break it down in layman's terms, I think it's a proper question.

Q. What did you ask Frolic to do that they didn't do?

[58] A. To let me come back to work four hours to build up my strength.

Q. Okay. And you're saying that they retaliated against you because you asked for that, that's what you're saying. I assume your lawyer's saying that's an accommodation. So you're saying they retaliated against you when you made that request to come back for four hours. How did they retaliate against you?

A. She told me they wouldn't allow it.

Q. And that's what this is about, they wouldn't allow it. Did they do anything else?

A. Huh?

Q. Did they do anything else other than tell you they're not going to allow you to come in on a reduced hour basis?

A. No. They fired me, or they let me go.

Q. Other than those things, anything else you can think of?

A. No.

Q. And you also state in Paragraph 39 that they created a hostile work environment. How did they create a hostile work environment?

MR. SUTTER: That's the same hostile work environment claim that we'll dismiss. And I want [59] to make it clear on the record that that's the only claim, only the claim of hostile work environment.

MR. BENNETT: Okay.

MR. SUTTER: There are two separate claims in there that you've recognized.

MR. BENNETT: I understand.

Q. You've also got in here that you were treated differently than similarly situated non-disabled employees. Is that the same as what you just described to me a bit ago? Is that what we're talking about, the different treatment?

A. Yes.

Q. That they let somebody, allegedly, Teresa allegedly, would let some folks come in on reduced hours?

A. Yes, sir.

Q. And that's the same claim here?

A. Yes, sir.

Q. You contend in your Complaint, Mrs. Ragsdale, that you have experienced severe mental, emotional and physically [sic] distress. Have you gone to see a psychiatrist or a psychologist for your mental wellbeing?

A. No, sir.

Q. What type of mental or emotional distress [60] have you suffered outside of your injury, your cancer?

A. Well, I was put on nerve pills because I just couldn't handle anything.

Q. You couldn't handle what? Because of your condition as far as being upset about your cancer?

A. Yes.

Q. And they put you on nerve pills because of that?

A. Yes, sir.

Q. Okay. And did they give you any other medication like that for nerves or stress?

A. I was on Valiums and they took me off them and put me on Prozac.

Q. Okay. Again, related to your cancer?

MR. SUTTER: Objection, calls for a medical conclusion.

Q. Did they tell you, is that what the doctor said?

A. I don't know.

Q. You don't know what he said?

A. No, I don't.

MR. BENNETT: Hold on one second, please. I think I may be through.

(Brief Pause)

Q. Mrs. Ragsdale, do you think that today you [61] can return to Frolic and do the job, if it was available you'd be able to return to that job with no restrictions whatsoever?

A. Today?

Q. Today.

A. Yes.

Q. Your physician hasn't given you any restrictions that would in any way keep you from doing the position you held at Frolic at the time you were terminated?

A. No.

Q. You can stand for eight hours a day?

A. Yes, sir.

Q. And you can lift and do all the repetitive motions required of that position today?

A. Yes, sir.

MR. BENNETT: That's all we have, Mrs. Ragsdale. Thank you.

MR. SUTTER: Thank you.

* * *

[63] COURT REPORTER'S CERTIFICATE

STATE OF ARKANSAS:
COUNTY OF CRITTENDEN:

I, JENNY L. BURKS, CSR, and Notary Public, Crittenden County, Arkansas, CERTIFY:

The foregoing deposition was taken before me at the time and place stated in the foregoing styled cause with the appearances as noted. Being a Court Reporter, I then reported the deposition in Stenotype, and the foregoing pages contain a full, true and correct transcript of my said Stenotype notes then and there taken.

I am not in the employ of and am not related to any of the parties or their counsel, and I have no interest in the matter involved.

WITNESS MY SIGNATURE, this, the 9th day of June, 1998.

/s/ Jenny L. Burks
JENNY L. BURKS, CSR
Arkansas Certification #369

My Commission Expires:
October 15, 2001

EXHIBIT #2

ORIENTATION CHECK LIST

JOB: Handwork

Department: Fitting

Employment Date: 3-17-95

EMPLOYEE'S NAME Tracy Ragsdale
SUPERVISORS NAME Taressia

1st DAY

1.	PLANT TOUR (where your job fits in production circle)	✓
2.	WORK HOURS (starting and quitting time)	✓
3.	BREAK PERIODS – Company Policy	✓
4.	LUNCH TIME POLICY	✓
5.	LOCATION OF RESTROOMS, CAFETERIA, VENDING MACHINES, PAY PHONES	✓
6.	OVERTIME POLICY	✓
7.	TIME CARD HANDLING	✓
8.	JOB DUTIES	✓
9.	PLANT/DEPT. SAFETY RULES	✓
10.	JOB HAZARDS (JSA)	✓
11.	ACCIDENT REPORTING POLICY	✓
12.	HAZARD COMMUNICATION TRAINING (where applicable)	✓

13.	FOOT PROTECTION	✓
14.	MACHINE LABELING – EYE/EAR PROTECTION	✓
15.	EVACUATION PROCEDURE (emergency alarms)	✓
16.	EMPLOYEE QUESTIONS	✓

2nd DAY

1.	SHOP RULES	✓
2.	PERFORMANCE EXPECTATIONS	✓
3.	QUALITY POLICY	✓
4.	HOUSEKEEPING	✓
5.	SMOKING REGULATION	✓
6.	EMPLOYEE QUESTIONS	✓

3rd DAY

1.	GROUP INSURANCE	✓
2.	MONEY ACCUMULATION PROGRAM (MAP)	✓
3.	LEAVE OF ABSENCE POLICY	✓
4.	VACATION POLICY	✓
5.	HOLIDAYS/HOLIDAY ELIGIBILITY	✓
6.	EMPLOYEE QUESTIONS	✓

4th DAY

1.	PROBATIONARY PERIOD	✓
2.	BIDDING PROCEDURE	✓
3.	BULLETIN BOARD	✓
4.	CHANGE-PERSONAL INFORMATION	✓
5.	QUALITY CIRCLE PROGRAM	✓
6.	EMPLOYEE QUESTIONS	✓

5th DAY

1.	EXPLAIN MAKE UP	✓
2.	BLUESHEET	✓
3.	OPEN DOOR POLICY	✓
4.	ADVANCEMENT POTENTIAL	✓
5.	EXPLAIN PAYCHECK DISTRIBUTION AND DEDUCTIONS	✓
6.	EMPLOYEE QUESTIONS	✓

THIS FORM MUST BE COMPLETED ON ALL NEW EMPLOYEES WITHIN THEIR FIRST WEEK OF EMPLOYMENT. COMPLETED FORM MUST BE SENT TO PLANT OFFICE FOR INDIVIDUAL PERSONNEL FILE.

The signature below acknowledges that I have been instructed regarding the above information.

Employee Signature
/s/ Tracy Ragsdale

Foreman's Signature
/s/ Taressia Stinnett

EXHIBIT #7

FROLIC FOOTWEAR DIVISION
General Office: 1020 Aggie Road,
Jonesboro, Arkansas 72401 (501) 932-7466

WOLVERINE
WWW WORLD WIDE

May 31, 1995

BULLETIN TO ALL EMPLOYEES

Please be advised the Family and Medical Leave Act has taken effect for all employees. The law provides eligible employees up to twelve (12) weeks of unpaid leave per year for certain family and medical reasons.

Please review the posting entitled "Your Rights Under the Family and Medical Leave Act of 1993." Do not hesitate to contact the Personnel Department should you have any questions.

/s/ Mary Lile Broadaway
Mary Lile Broadaway
Personnel Manager

MLB/la

Your Rights Under the Family and Medical Leave Act of 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

Reasons For Taking Leave:

Unpaid leave must be granted for *any* of the following reasons:

- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's or employer's option, certain kinds of *paid* leave may be substituted for unpaid leave.

Advance Notice and Medical Certification:

The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

Job Benefits and Protection:

- For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."
- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Unlawful Acts By Employers:

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA;
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement:

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

For Additional Information:

contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

[LOGO]
U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

WH Publication 1420
June 1993

EXHIBIT #8

APPLICATION FOR SICK LEAVE
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

THIS FORM MUST BE FULLY COMPLETED AND SIGNED BY THE EMPLOYEE AND ATTENDING PHYSICIAN AND DELIVERED TO THE EMPLOYMENT OFFICE OF THE PLANT WHERE EMPLOYEE WORKS WITHIN THREE (3) WORK DAYS FROM INITIAL ABSENCE CAUSED BY ILLNESS/DISABILITY OR WITHIN THREE (3) SCHEDULED WORK DAYS FOLLOWING END OF INITIAL SICK LEAVE FOR AN EXTENSION.

I. TO BE COMPLETED BY EMPLOYEE
NAME OF EMPLOYEE Tracy Lynn Ragsdale
CLOCK NO. 79038
DEPARTMENT Fitting
HOME ADDRESS P.O. Box 115 (STREET)
Black Rock, AR 72415 (CITY, STATE AND ZIP)
TELEPHONE NUMBER WHERE YOU CAN BE REACHED 878-6361 or 869-2069
I HEREBY APPLY FOR SICK LEAVE AND AUTHORIZE MY PERSONAL DOCTOR TO FURNISH ANY MEDICAL INFORMATION TO MY EMPLOYER, EMPLOYER'S INSURANCE COMPANY OR COMPANY NURSE THAT MAY BE REQUESTED DURING THE TERM OF THIS ILLNESS OR DISABILITY.
/s/ Tracy L. Ragsdale
(EMPLOYEE SIGNATURE)
2/21/96
(DATE SIGNED)

II. TO BE COMPLETED BY EMPLOYEE'S ATTENDING PHYSICIAN
THIS IS TO CERTIFY THAT ON _____ (MONTH-DAY-YEAR) I EXAMINED THE ABOVE NAMED INDIVIDUAL AND I APPROVE X, DO NOT APPROVE _, HIM/HER FOR SICK LEAVE BEGINING [sic] ON 2/21/96, I ESTIMATE THAT THE PERIOD OF DISABILITY SHOULD NOT EXCEED __ DAYS FORM THE BEGINNING DATE OF SICK LEAVE. THIS APPROVAL IS BASED ON THE FOLLOWING DIAGNOSIS:
Abnormal CXR – Mediastinoscopy 2/22/96 per Dr. Stevenson/Raborn
WHICH IS IN MY OPINION, IS THE PRIMARY CAUSE FOR APPLICANT'S NEED TO BE ABSENT FROM WORK.
/s/ [Illegible]
(PHYSICIAN'S SIGNATURE)
2/21/96
(DATE SIGNED)
800 So. Church Suite 400 Jonesboro, Ar. 72401
(PHYSICIAN'S OFFICE ADDRESS AND PHONE NUMBER)

NOTE: ABSENCE FROM WORK DUE TO ILLNESS/ DISABILITY AND FAILURE TO FURNISH THE INFORMATION REQUESTED ABOVE WILL RESULT IN TERMINATION.
NO LEAVE OR EXTENSIONS THEREOF SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.
THIS FORM IS NOT A SUBSTITUTE FOR A RETURN TO WORK SLIP.

APPROVED SICK LEAVE RECORD
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

DATE 2-21-96

Tracy Ragsdale IS HEREWITH AUTHORIZED A 30 day (LENGTH/TIME) sick (TYPE) LEAVE PERIOD, ALL REQUIREMENTS BEING MET, FOR THE FOLLOWING REASONS: _____

_____

_____

SCHEDULED DATE TO RETURN TO WORK: 3-22-96

_____

/s/ Taressia Stinnett
(FOREMAN/DEPARTMENT SUPERVISOR) (DATE)

/s/ [Illegible]
(PLANT MANAGER) 2-21-96 (DATE)

/s/ Tracy Ragsdale (EMPLOYEE) 2-21-96 (DATE)

THE FOLLOWING POLICIES SHALL GOVERN ALL EXTENSIONS OF LEAVE PERIODS IN FORCE:

(1) NO LEAVE SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.

(2) IN ORDER FOR ANY LEAVE PERIOD TO BE EXTENDED IT SHALL BE NECESSARY FOR THE EMPLOYEE TO OBTAIN ANOTHER APPLICATION FOR SICK LEAVE FROM THE EMPLOYMENT OR PLANT OFFICE WITHIN THREE (3) DAYS PRIOR TO THE CONCLUSION OF THE CURRENT LEAVE PERIOD, AND MAKE WRITTEN APPLICATION FOR AN ADDITIONAL THIRTY (30) DAYS LEAVE PERIOD. THE APPLICATION FOR SICK LEAVE MUST BE COMPLETED, SIGNED AND DATED BY THE ATTENDING PHYSICIAN.

(3) THE APPLICATION FOR SICK LEAVE MUST BE RETURNED WITHIN THREE (3) SCHEDULED WORK DAYS OF THE CONCLUSION OF THE CURRENT SICK LEAVE PERIOD.

(4) ANOTHER COPY OF A COMPLETED APPROVED LEAVE RECORD, SIGNED AND DATED BY THE PLANT MANAGER AND FOREMAN OR SUPERVISOR, MUST BE OBTAINED BY THE EMPLOYEE PRIOR TO FINAL APPROVAL OF THE EXTENSION TO THE LEAVE.

(5) SHOULD THE EMPLOYEE FAIL TO EXTEND SICK LEAVE AS ENUMERATED ABOVE, THE EMPLOYEE MUST REPORT FOR WORK AT 7:00 A.M. OF THE NEXT SCHEDULED WORK DAY FOLLOWING THE CONCLUSION OF THE LEAVE WITH A DOCTOR'S STATEMENT PRONOUNCING THAT THE EMPLOYEE IS PHYSICALLY ABLE TO RETURN TO REGULAR WORK.

(6) IN THE EVENT A WRITTEN REQUEST FOR AN EXTENSION OF CURRENT LEAVE PERIOD IS NOT TIMELY AS ENUMERATED ABOVE, THE EMPLOYEE SHALL AUTOMATICALLY TERMINATE HIMSELF WITH LOSS OF ALL JOB RIGHTS AND PRIVILEGES. REASON STATED WILL BE LISTED AS VOLUNTARILY QUIT. ANY LEAVE OBTAINED BY FRAUD WILL RESULT IN TERMINATION FROM EMPLOYMENT.

APPLICATION FOR SICK LEAVE
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

THIS FORM MUST BE FULLY COMPLETED AND SIGNED BY THE EMPLOYEE AND ATTENDING PHYSICIAN AND DELIVERED TO THE EMPLOYMENT OFFICE OF THE PLANT WHERE EMPLOYEE WORKS WITHIN THREE (3) WORK DAYS FROM INITIAL ABSENCE CAUSED BY ILLNESS/DISABILITY OR WITHIN THREE (3) SCHEDULED WORK DAYS FOLLOWING END OF INITIAL SICK LEAVE FOR AN EXTENSION.

I. TO BE COMPLETED BY EMPLOYEE
NAME OF EMPLOYEE Tracy Lynn Ragsdale
CLOCK NO. 79032
DEPARTMENT Fitting
HOME ADDRESS 422 West Main (STREET)
Black Rock, AR 72415 (CITY, STATE AND ZIP)
TELEPHONE NUMBER WHERE YOU CAN BE REACHED 878-6361 or 869-2069
I HEREBY APPLY FOR SICK LEAVE AND AUTHORIZE MY PERSONAL DOCTOR TO FURNISH ANY MEDICAL INFORMATION TO MY EMPLOYER, EMPLOYER'S INSURANCE COMPANY OR COMPANY NURSE THAT MAY BE REQUESTED DURING THE TERM OF THIS ILLNESS OR DISABILITY.
/s/ Tracy L. Ragsdale
(EMPLOYEE SIGNATURE)
3-18-96
(DATE SIGNED)

II. TO BE COMPLETED BY EMPLOYEE'S ATTENDING PHYSICIAN
THIS IS TO CERTIFY THAT ON _____ (MONTH-DAY-YEAR) I EXAMINED THE ABOVE NAMED INDIVIDUAL AND I APPROVE X, DO

NOT APPROVE _, HIM/HER FOR SICK LEAVE BEGINING [sic] ON 3-23-96, I ESTIMATE THAT THE PERIOD OF DISABILITY SHOULD NOT EXCEED 30 DAYS FROM THE BEGINNING DATE OF SICK LEAVE. THIS APPROVAL IS BASED ON THE FOLLOWING DIAGNOSIS:

_____

_____

_____

WHICH IS IN MY OPINION, IS THE PRIMARY CAUSE FOR APPLICANT'S NEED TO BE ABSENT FROM WORK.

/s/ [Illegible]
(PHYSICIAN'S SIGNATURE)
3-18-96
(DATE SIGNED)
800 So. Church Jonesboro, Ar. 932-1198
(PHYSICIAN'S OFFICE ADDRESS AND PHONE NUMBER)

NOTE: ***ABSENCE FROM WORK DUE TO ILLNESS/ DISABILITY AND FAILURE TO FURNISH THE INFORMATION REQUESTED ABOVE WILL RESULT IN TERMINATION.***
NO LEAVE OR EXTENSIONS THEREOF SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.
THIS FORM IS NOT A SUBSTITUTE FOR A RETURN TO WORK SLIP.

MEDICAL ARTS BUILDING

800 S. Church • Jonesboro, Arkansas 72401

[Doctor's Names Omitted In Printing]

[Handwritten Note From Doctor]

For Tracy Ragsdale
Address _____
Date 2/19/96
[LOGO] Ms. Ragdale has a probable lymphoma and should not work over 8 hrs. a day for the present. She is having surgery on 2/21 or 2/22.

LABEL AS TO CONTENT
/s/ [Illegible] M.D.
REPT UT DICT 1 2 3 4 5 TIMES P.R.N. [ ]
NON REP [ ]

APPROVED SICK LEAVE RECORD
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

DATE 3-23-96

Tracy Ragsdale IS HEREWITH AUTHORIZED A 30 day (LENGTH/TIME) sick (TYPE) LEAVE PERIOD, ALL REQUIREMENTS BEING MET, FOR THE FOLLOWING REASONS: _____

_____

_____

SCHEDULED DATE TO RETURN TO WORK: 4-22-96

_____

/s/ Taressia Stinnett 3-18-96
(FOREMAN/DEPARTMENT SUPERVISOR) (DATE)

/s/ [Illegible]
(PLANT MANAGER) 3-18-96 (DATE)

/s/ Tracy Ragsdale (EMPLOYEE) 3-18-96 (DATE)

THE FOLLOWING POLICIES SHALL GOVERN ALL EXTENSIONS OF LEAVE PERIODS IN FORCE:

(1) NO LEAVE SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.

(2) IN ORDER FOR ANY LEAVE PERIOD TO BE EXTENDED IT SHALL BE NECESSARY FOR THE EMPLOYEE TO OBTAIN ANOTHER APPLICATION FOR SICK LEAVE FROM THE EMPLOYMENT OR PLANT OFFICE WITHIN THREE (3) DAYS PRIOR TO THE CONCLUSION OF THE CURRENT LEAVE PERIOD, AND MAKE WRITTEN APPLICATION FOR AN ADDITIONAL THIRTY (30) DAYS LEAVE PERIOD. THE APPLICATION FOR SICK LEAVE MUST BE COMPLETED, SIGNED AND DATED BY THE ATTENDING PHYSICIAN.

(3) THE APPLICATION FOR SICK LEAVE MUST BE RETURNED WITHIN THREE (3) SCHEDULED WORK DAYS OF THE CONCLUSION OF THE CURRENT SICK LEAVE PERIOD.

(4) ANOTHER COPY OF A COMPLETED APPROVED LEAVE RECORD, SIGNED AND DATED BY THE PLANT MANAGER AND FOREMAN OR SUPERVISOR, MUST BE OBTAINED BY THE EMPLOYEE PRIOR TO FINAL APPROVAL OF THE EXTENSION TO THE LEAVE.

(5) SHOULD THE EMPLOYEE FAIL TO EXTEND SICK LEAVE AS ENUMERATED ABOVE, THE EMPLOYEE MUST REPORT FOR WORK AT 7:00 A.M. OF THE NEXT SCHEDULED WORK DAY FOLLOWING THE CONCLUSION OF THE LEAVE WITH A DOCTOR'S STATEMENT PRONOUNCING

THAT THE EMPLOYEE IS PHYSICALLY ABLE TO RETURN TO REGULAR WORK.

(6) IN THE EVENT A WRITTEN REQUEST FOR AN EXTENSION OF CURRENT LEAVE PERIOD IS NOT TIMELY AS ENUMERATED ABOVE, THE EMPLOYEE SHALL AUTOMATICALLY TERMINATE HIMSELF WITH LOSS OF ALL JOB RIGHTS AND PRIVILEGES. REASON STATED WILL BE LISTED AS VOLUNTARILY QUIT. ANY LEAVE OBTAINED BY FRAUD WILL RESULT IN TERMINATION FROM EMPLOYMENT.

APPLICATION FOR SICK LEAVE
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

THIS FORM MUST BE FULLY COMPLETED AND SIGNED BY THE EMPLOYEE AND ATTENDING PHYSICIAN AND DELIVERED TO THE EMPLOYMENT OFFICE OF THE PLANT WHERE EMPLOYEE WORKS WITHIN THREE (3) WORK DAYS FROM INITIAL ABSENCE CAUSED BY ILLNESS/DISABILITY OR WITHIN THREE (3) SCHEDULED WORK DAYS FOLLOWING END OF INITIAL SICK LEAVE FOR AN EXTENSION.

I. TO BE COMPLETED BY EMPLOYEE
NAME OF EMPLOYEE Tracy Ragsdale
CLOCK NO. ___
DEPARTMENT _____
HOME ADDRESS _____ (STREET)
(CITY, STATE AND ZIP)
TELEPHONE NUMBER WHERE YOU CAN BE REACHED _____

I HEREBY APPLY FOR SICK LEAVE AND AUTHORIZE MY PERSONAL DOCTOR TO FURNISH ANY MEDICAL INFORMATION TO MY EMPLOYER, EMPLOYER'S INSURANCE COMPANY OR COMPANY NURSE THAT MAY BE REQUESTED DURING THE TERM OF THIS ILLNESS OR DISABILITY.

_____
(EMPLOYEE SIGNATURE)

_____
(DATE SIGNED)

II. TO BE COMPLETED BY EMPLOYEE'S ATTENDING PHYSICIAN
THIS IS TO CERTIFY THAT ON 2-12-96 (MONTH-DAY-YEAR) I EXAMINED THE ABOVE NAMED INDIVIDUAL AND I APPROVE X, DO NOT APPROVE _, HIM/HER (CIRCLED) FOR SICK LEAVE BEGINING [sic] ON 4-22-96, I ESTIMATE THAT THE PERIOD OF DISABILITY SHOULD NOT EXCEED 30 DAYS [unknown at this time] FROM THE BEGINNING DATE OF SICK LEAVE. THIS APPROVAL IS BASED ON THE FOLLOWING DIAGNOSIS:
Lymphoma

WHICH IS IN MY OPINION, IS THE PRIMARY CAUSE FOR APPLICANT'S NEED TO BE ABSENT FROM WORK.
/s/ [Illegible]
(PHYSICIANS SIGNATURE)
4-18-96
(DATE SIGNED)
800 So. Church Suite 400 Jonesboro, Ar. 72401
(PHYSICIAN'S OFFICE ADDRESS AND PHONE NUMBER)

NOTE: ABSENCE FROM WORK DUE TO ILLNESS/ DISABILITY AND FAILURE TO FURNISH THE INFORMATION REQUESTED ABOVE WILL RESULT IN TERMINATION.
NO LEAVE OR EXTENSIONS THEREOF SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.
THIS FORM IS NOT A SUBSTITUTE FOR A RETURN TO WORK SLIP.

APPROVED SICK LEAVE RECORD
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

DATE 4-22-96

Tracy Ragsdale IS HEREWITH AUTHORIZED A 30 day (LENGTH/TIME) sick (TYPE) LEAVE PERIOD, ALL REQUIREMENTS BEING MET, FOR THE FOLLOWING REASONS: _____

_____

_____

SCHEDULED DATE TO RETURN TO WORK: 5-22-96

_____
/s/ Taressia Stinnett 4-22-96
(FOREMAN/DEPARTMENT SUPERVISOR) (DATE)

/s/ Gene Cook
(PLANT MANAGER) 4-22-96 (DATE)

_____ (EMPLOYEE) _____ (DATE)

Mailed 4-22-96

THE FOLLOWING POLICIES SHALL GOVERN ALL EXTENSIONS OF LEAVE PERIODS IN FORCE:

(1) NO LEAVE SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.

(2) IN ORDER FOR ANY LEAVE PERIOD TO BE EXTENDED IT SHALL BE NECESSARY FOR THE EMPLOYEE TO OBTAIN ANOTHER APPLICATION FOR SICK LEAVE FROM THE EMPLOYMENT OR PLANT OFFICE WITHIN THREE (3) DAYS PRIOR TO THE CONCLUSION OF THE CURRENT LEAVE PERIOD, AND MAKE WRITTEN APPLICATION FOR AN ADDITIONAL THIRTY (30) DAYS LEAVE PERIOD. THE APPLICATION FOR SICK LEAVE MUST BE COMPLETED, SIGNED AND DATED BY THE ATTENDING PHYSICIAN.

(3) THE APPLICATION FOR SICK LEAVE MUST BE RETURNED WITHIN THREE (3) SCHEDULED WORK DAYS OF THE CONCLUSION OF THE CURRENT SICK LEAVE PERIOD.

(4) ANOTHER COPY OF A COMPLETED APPROVED LEAVE RECORD, SIGNED AND DATED BY THE PLANT MANAGER AND FOREMAN OR SUPERVISOR, MUST BE OBTAINED BY THE EMPLOYEE PRIOR TO FINAL APPROVAL OF THE EXTENSION TO THE LEAVE.

(5) SHOULD THE EMPLOYEE FAIL TO EXTEND SICK LEAVE AS ENUMERATED ABOVE, THE EMPLOYEE MUST REPORT FOR WORK AT 7:00 A.M. OF THE NEXT SCHEDULED WORK DAY FOLLOWING THE CONCLUSION OF THE LEAVE WITH A DOCTOR'S STATEMENT PRONOUNCING THAT THE EMPLOYEE IS PHYSICALLY ABLE TO RETURN TO REGULAR WORK.

(6) IN THE EVENT A WRITTEN REQUEST FOR AN EXTENSION OF CURRENT LEAVE PERIOD IS NOT TIMELY AS ENUMERATED ABOVE, THE EMPLOYEE SHALL AUTOMATICALLY TERMINATE HIMSELF WITH LOSS OF ALL JOB RIGHTS AND PRIVILEGES. REASON STATED WILL BE LISTED AS VOLUNTARILY QUIT. ANY LEAVE OBTAINED BY FRAUD WILL RESULT IN TERMINATION FROM EMPLOYMENT.

APPLICATION FOR SICK LEAVE
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

THIS FORM MUST BE FULLY COMPLETED AND SIGNED BY THE EMPLOYEE AND ATTENDING PHYSICIAN AND DELIVERED TO THE EMPLOYMENT OFFICE OF THE PLANT WHERE EMPLOYEE WORKS WITHIN THREE (3) WORK DAYS FROM INITIAL ABSENCE CAUSED BY ILLNESS/DISABILITY OR WITHIN THREE (3) SCHEDULED WORK DAYS FOLLOWING END OF INITIAL SICK LEAVE FOR AN EXTENSION.

I. TO BE COMPLETED BY EMPLOYEE
NAME OF EMPLOYEE Tracy Lynn Ragsdale
CLOCK NO. 79032
DEPARTMENT Fitting
HOME ADDRESS P.O. Box 115 (STREET)
Black Rock, AR 72415 (CITY, STATE AND ZIP)
TELEPHONE NUMBER WHERE YOU CAN BE REACHED 878-6361
I HEREBY APPLY FOR SICK LEAVE AND AUTHORIZE MY PERSONAL DOCTOR TO FURNISH ANY MEDICAL INFORMATION TO MY EMPLOYER,

EMPLOYER'S INSURANCE COMPANY OR COMPANY NURSE THAT MAY BE REQUESTED DURING THE TERM OF THIS ILLNESS OR DISABILITY.
/s/ Tracy L. Ragsdale
(EMPLOYEE SIGNATURE)
5/21/96
(DATE SIGNED)

II. TO BE COMPLETED BY EMPLOYEE'S ATTENDING PHYSICIAN
THIS IS TO CERTIFY THAT ON 5-21-96 (MONTH-DAY-YEAR) I EXAMINED THE ABOVE NAMED INDIVIDUAL AND I APPROVE X, DO NOT APPROVE _, HIM/HER FOR SICK LEAVE BEGINING [sic] ON 5/22/96, I ESTIMATE THAT THE PERIOD OF DISABILITY SHOULD NOT EXCEED 30 DAYS FORM THE BEGINNING DATE OF SICK LEAVE. THIS APPROVAL IS BASED ON THE FOLLOWING DIAGNOSIS:

_____

_____

_____

WHICH IS IN MY OPINION, IS THE PRIMARY CAUSE FOR APPLICANT'S NEED TO BE ABSENT FROM WORK.
/s/ [Illegible]
(PHYSICIANS SIGNATURE)
5/21/96
(DATE SIGNED)
800 So. Church Suite 400 Jonesboro, Ar. 72401
932-9028
(PHYSICIAN'S OFFICE ADDRESS AND PHONE NUMBER)

NOTE: ABSENCE FROM WORK DUE TO ILLNESS/ DISABILITY AND FAILURE TO FURNISH THE INFORMATION REQUESTED ABOVE WILL RESULT IN TERMINATION.

NO LEAVE OR EXTENSIONS THEREOF SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME. THIS FORM IS NOT A SUBSTITUTE FOR A RETURN TO WORK SLIP.

APPROVED SICK LEAVE RECORD
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

DATE 5-22-96

Tracy Ragsdale IS HEREWITH AUTHORIZED A 30 day (LENGTH/TIME) _____ (TYPE) LEAVE PERIOD, ALL REQUIREMENTS BEING MET, FOR THE FOLLOWING REASONS: _____

_____

_____

SCHEDULED DATE TO RETURN TO WORK: 6-21-96

_____

/s/ Taressia Stinnett
(FOREMAN/DEPARTMENT SUPERVISOR) 5-22-96 (DATE)

/s/ Gene Cook
(PLANT MANAGER) 5-22-96 (DATE)

/s/ Tracy Ragsdale (EMPLOYEE) 5-22-96 (DATE)

THE FOLLOWING POLICIES SHALL GOVERN ALL EXTENSIONS OF LEAVE PERIODS IN FORCE:

(1) NO LEAVE SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.

(2) IN ORDER FOR ANY LEAVE PERIOD TO BE EXTENDED IT SHALL BE NECESSARY FOR THE EMPLOYEE TO OBTAIN ANOTHER APPLICATION

FOR SICK LEAVE FROM THE EMPLOYMENT OR PLANT OFFICE WITHIN THREE (3) DAYS PRIOR TO THE CONCLUSION OF THE CURRENT LEAVE PERIOD, AND MAKE WRITTEN APPLICATION FOR AN ADDITIONAL THIRTY (30) DAYS LEAVE PERIOD. THE APPLICATION FOR SICK LEAVE MUST BE COMPLETED, SIGNED AND DATED BY THE ATTENDING PHYSICIAN.

(3) THE APPLICATION FOR SICK LEAVE MUST BE RETURNED WITHIN THREE (3) SCHEDULED WORK DAYS OF THE CONCLUSION OF THE CURRENT SICK LEAVE PERIOD.

(4) ANOTHER COPY OF A COMPLETED APPPOVED LEAVE RECORD, SIGNED AND DATED BY THE PLANT MANAGER AND FOREMAN OR SUPERVISOR, MUST BE OBTAINED BY THE EMPLOYEE PRIOR TO FINAL APPROVAL OF THE EXTENSION TO THE LEAVE.

(5) SHOULD THE EMPLOYEE FAIL TO EXTEND SICK LEAVE AS ENUMERATED ABOVE, THE EMPLOYEE MUST REPORT FOR WORK AT 7:00 A.M. OF THE NEXT SCHEDULED WORK DAY FOLLOWING THE CONCLUSION OF THE LEAVE WITH A DOCTOR'S STATEMENT PRONOUNCING THAT THE EMPLOYEE IS PHYSICALLY ABLE TO RETURN TO REGULAR WORK.

(6) IN THE EVENT A WRITTEN REQUEST FOR AN EXTENSION OF CURRENT LEAVE PERIOD IS NOT TIMELY AS ENUMERATED ABOVE, THE EMPLOYEE SHALL AUTOMATICALLY TERMINATE HIMSELF WITH LOSS OF ALL JOB RIGHTS AND PRIVILEGES. REASON STATED WILL BE LISTED AS VOLUNTARILY QUIT. ANY LEAVE OBTAINED BY FRAUD WILL RESULT IN TERMINATION FROM EMPLOYMENT.

APPLICATION FOR SICK LEAVE
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

THIS FORM MUST BE FULLY COMPLETED AND SIGNED BY THE EMPLOYEE AND ATTENDING PHYSICIAN AND DELIVERED TO THE EMPLOYMENT OFFICE OF THE PLANT WHERE EMPLOYEE WORKS WITHIN THREE (3) WORK DAYS FROM INITIAL ABSENCE CAUSED BY ILLNESS/DISABILITY OR WITHIN THREE (3) SCHEDULED WORK DAYS FOLLOWING END OF INITIAL SICK LEAVE FOR AN EXTENSION.

I. TO BE COMPLETED BY EMPLOYEE
NAME OF EMPLOYEE Tracy Ragsdale
CLOCK NO. 79032
DEPARTMENT Fitting
HOME ADDRESS P.O. Box 115 (STREET)
Black Rock, AR 72415 (CITY, STATE AND ZIP)
TELEPHONE NUMBER WHERE YOU CAN BE REACHED (501) 878-6361
I HEREBY APPLY FOR SICK LEAVE AND AUTHORIZE MY PERSONAL DOCTOR TO FURNISH ANY MEDICAL INFORMATION TO MY EMPLOYER, EMPLOYER'S INSURANCE COMPANY OR COMPANY NURSE THAT MAY BE REQUESTED DURING THE TERM OF THIS ILLNESS OR DISABILITY.
/s/ Tracy L. Ragsdale
(EMPLOYEE SIGNATURE)

_____
(DATE SIGNED)

II. TO BE COMPLETED BY EMPLOYEE'S ATTENDING PHYSICIAN
THIS IS TO CERTIFY THAT ON 6-18-96 (MONTH-DAY-YEAR) I EXAMINED THE ABOVE NAMED INDIVIDUAL AND I APPROVE X, DO NOT

APPROVE _, HIM/HER FOR SICK LEAVE BEGINING [sic] ON 6-20-96, I ESTIMATE THAT THE PERIOD OF DISABILITY SHOULD NOT EXCEED 30 DAYS FROM THE BEGINNING DATE OF SICK LEAVE. THIS APPROVAL IS BASED ON THE FOLLOWING DIAGNOSIS:
[Illegible] Hodgkins Disease [Illegible]
WHICH IS IN MY OPINION, IS THE PRIMARY CAUSE FOR APPLICANT'S NEED TO BE ABSENT FROM WORK.
/s/ [Illegible]
(PHYSICIAN'S SIGNATURE)
6-18-96
(DATE SIGNED)
224 East Matthews, Jonesboro, AR 72401
501-972-4510
(PHYSICIAN'S OFFICE ADDRESS AND PHONE NUMBER)

NOTE: ABSENCE FROM WORK DUE TO ILLNESS/ DISABILITY AND FAILURE TO FURNISH THE INFORMATION REQUESTED ABOVE WILL RESULT IN TERMINATION.
NO LEAVE OR EXTENSIONS THEREOF SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.
THIS FORM IS NOT A SUBSTITUTE FOR A RETURN TO WORK SLIP.

APPROVED SICK LEAVE RECORD
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

DATE 6-20-96

Tracy Ragsdale IS HEREWITH AUTHORIZED A 30 day (LENGTH/TIME) sick (TYPE) LEAVE PERIOD, ALL REQUIREMENTS BEING MET, FOR THE FOLLOWING REASONS: _____

_____

_____

SCHEDULED DATE TO RETURN TO WORK: 7-22-96

_____

/s/ _____ _____
(FOREMAN/DEPARTMENT SUPERVISOR) (DATE)

/s/ Gene Cook
(PLANT MANAGER) 6-21-96 (DATE)

/s/ Tracy Ragsdale (EMPLOYEE) 6-21-96 (DATE)

THE FOLLOWING POLICIES SHALL GOVERN ALL EXTENSIONS OF LEAVE PERIODS IN FORCE:

(1) NO LEAVE SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.

(2) IN ORDER FOR ANY LEAVE PERIOD TO BE EXTENDED IT SHALL BE NECESSARY FOR THE EMPLOYEE TO OBTAIN ANOTHER APPLICATION FOR SICK LEAVE FROM THE EMPLOYMENT OR PLANT OFFICE WITHIN THREE (3) DAYS PRIOR TO THE CONCLUSION OF THE CURRENT LEAVE PERIOD, AND MAKE WRITTEN APPLICATION FOR AN ADDITIONAL THIRTY (30) DAYS LEAVE PERIOD. THE APPLICATION FOR SICK LEAVE MUST BE COMPLETED, SIGNED AND DATED BY THE ATTENDING PHYSICIAN.

(3) THE APPLICATION FOR SICK LEAVE MUST BE RETURNED WITHIN THREE (3) SCHEDULED WORK DAYS OF THE CONCLUSION OF THE CURRENT SICK LEAVE PERIOD.

(4) ANOTHER COPY OF A COMPLETED APPROVED LEAVE RECORD, SIGNED AND DATED BY THE PLANT MANAGER AND FOREMAN OR SUPERVISOR, MUST BE OBTAINED BY THE EMPLOYEE PRIOR TO FINAL APPROVAL OF THE EXTENSION TO THE LEAVE.

(5) SHOULD THE EMPLOYEE FAIL TO EXTEND SICK LEAVE AS ENUMERATED ABOVE, THE EMPLOYEE MUST REPORT FOR WORK AT 7:00 A.M. OF THE NEXT SCHEDULED WORK DAY FOLLOWING THE CONCLUSION OF THE LEAVE WITH A DOCTOR'S STATEMENT PRONOUNCING THAT THE EMPLOYEE IS PHYSICALLY ABLE TO RETURN TO REGULAR WORK.

(6) IN THE EVENT A WRITTEN REQUEST FOR AN EXTENSION OF CURRENT LEAVE PERIOD IS NOT TIMELY AS ENUMERATED ABOVE, THE EMPLOYEE SHALL AUTOMATICALLY TERMINATE HIMSELF WITH LOSS OF ALL JOB RIGHTS AND PRIVILEGES. REASON STATED WILL BE LISTED AS VOLUNTARILY QUIT. ANY LEAVE OBTAINED BY FRAUD WILL RESULT IN TERMINATION FROM EMPLOYMENT.

APPLICATION FOR SICK LEAVE
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

THIS FORM MUST BE FULLY COMPLETED AND SIGNED BY THE EMPLOYEE AND ATTENDING PHYSICIAN AND DELIVERED TO THE EMPLOYMENT OFFICE OF THE PLANT WHERE EMPLOYEE WORKS WITHIN THREE (3) WORK DAYS FROM INITIAL ABSENCE CAUSED BY ILLNESS/DISABILITY OR WITHIN THREE (3) SCHEDULED WORK DAYS FOLLOWING END OF INITIAL SICK LEAVE FOR AN EXTENSION.

I. TO BE COMPLETED BY EMPLOYEE
NAME OF EMPLOYEE Tracy Lynn Ragsdale
CLOCK NO. _____
DEPARTMENT _____
HOME ADDRESS P.O. Box 115 (STREET)
Black Rock, AR 72415 (CITY, STATE AND ZIP)
TELEPHONE NUMBER WHERE YOU CAN BE REACHED 501-878-6361
I HEREBY APPLY FOR SICK LEAVE AND AUTHORIZE MY PERSONAL DOCTOR TO FURNISH ANY MEDICAL INFORMATION TO MY EMPLOYER, EMPLOYER'S INSURANCE COMPANY OR COMPANY NURSE THAT MAY BE REQUESTED DURING THE TERM OF THIS ILLNESS OR DISABILITY.

_____
(EMPLOYEE SIGNATURE)

_____
(DATE SIGNED)

II. TO BE COMPLETED BY EMPLOYEE'S ATTENDING PHYSICIAN
THIS IS TO CERTIFY THAT ON 04/30/96 (MONTH-DAY-YEAR) I EXAMINED THE ABOVE NAMED INDIVIDUAL AND I APPROVE X, DO NOT

APPROVE _, HIM/HER FOR SICK LEAVE BEGINING [sic] ON ~~11/30/96~~ 07/22/96, I ESTIMATE THAT THE PERIOD OF DISABILITY SHOULD NOT EXCEED ~~120~~ 30 DAYS FROM THE BEGINNING DATE OF SICK LEAVE. THIS APPROVAL IS BASED ON THE FOLLOWING DIAGNOSIS:
[Illegible] one hundred twenty day Hodgkins Disease, Stage IIA
WHICH IS IN MY OPINION, IS THE PRIMARY CAUSE FOR APPLICANT'S NEED TO BE ABSENT FROM WORK.
/s/ John K. Lynch
07/19/96
(DATE SIGNED)
LOVERD M. PEACOCK, MD
JOHN K LYNCH, DO
P.O. BOX 719
JONESBORO, ARKANSAS 72402
(PHYSICIAN'S OFFICE ADDRESS AND PHONE NUMBER)

NOTE: ABSENCE FROM WORK DUE TO ILLNESS/ DISABILITY AND FAILURE TO FURNISH THE INFORMATION REQUESTED ABOVE WILL RESULT IN TERMINATION.
NO LEAVE OR EXTENSIONS THEREOF SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.
THIS FORM IS NOT A SUBSTITUTE FOR A RETURN TO WORK SLIP.

APPROVED SICK LEAVE RECORD
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

DATE 7-22-96

Tracy Ragsdale IS HEREWITH AUTHORIZED A 30 day (LENGTH/TIME) sick (TYPE) LEAVE PERIOD, ALL REQUIREMENTS BEING MET, FOR THE FOLLOWING REASONS: _____

_____

_____

SCHEDULED DATE TO RETURN TO WORK: 8-21-96

_____

/s/ Taressia Stinnett 7-24-96
(FOREMAN/DEPARTMENT SUPERVISOR) (DATE)

/s/ Gene Cook 7-24-96
(PLANT MANAGER) (DATE)

/s/ Tracy Ragsdale (EMPLOYEE) 7-24-96 (DATE)

THE FOLLOWING POLICIES SHALL GOVERN ALL EXTENSIONS OF LEAVE PERIODS IN FORCE:

(1) NO LEAVE SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.

(2) IN ORDER FOR ANY LEAVE PERIOD TO BE EXTENDED IT SHALL BE NECESSARY FOR THE EMPLOYEE TO OBTAIN ANOTHER APPLICATION FOR SICK LEAVE FROM THE EMPLOYMENT OR PLANT OFFICE WITHIN THREE (3) DAYS PRIOR TO THE CONCLUSION OF THE CURRENT LEAVE PERIOD, AND MAKE WRITTEN APPLICATION FOR AN ADDITIONAL THIRTY (30) DAYS LEAVE PERIOD. THE APPLICATION FOR SICK LEAVE MUST BE COMPLETED, SIGNED AND DATED BY THE ATTENDING PHYSICIAN.

(3) THE APPLICATION FOR SICK LEAVE MUST BE RETURNED WITHIN THREE (3) SCHEDULED WORK DAYS OF THE CONCLUSION OF THE CURRENT SICK LEAVE PERIOD.

(4) ANOTHER COPY OF A COMPLETED APPROVED LEAVE RECORD, SIGNED AND DATED BY THE PLANT MANAGER AND FOREMAN OR SUPERVISOR, MUST BE OBTAINED BY THE EMPLOYEE PRIOR TO FINAL APPROVAL OF THE EXTENSION TO THE LEAVE.

(5) SHOULD THE EMPLOYEE FAIL TO EXTEND SICK LEAVE AS ENUMERATED ABOVE, THE EMPLOYEE MUST REPORT FOR WORK AT 7:00 A.M. OF THE NEXT SCHEDULED WORK DAY FOLLOWING THE CONCLUSION OF THE LEAVE WITH A DOCTOR'S STATEMENT PRONOUNCING THAT THE EMPLOYEE IS PHYSICALLY ABLE TO RETURN TO REGULAR WORK.

(6) IN THE EVENT A WRITTEN REQUEST FOR AN EXTENSION OF CURRENT LEAVE PERIOD IS NOT TIMELY AS ENUMERATED ABOVE, THE EMPLOYEE SHALL AUTOMATICALLY TERMINATE HIMSELF WITH LOSS OF ALL JOB RIGHTS AND PRIVILEGES. REASON STATED WILL BE LISTED AS VOLUNTARILY QUIT. ANY LEAVE OBTAINED BY FRAUD WILL RESULT IN TERMINATION FROM EMPLOYMENT.

APPLICATION FOR SICK LEAVE
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

THIS FORM MUST BE FULLY COMPLETED AND SIGNED BY THE EMPLOYEE AND ATTENDING PHYSICIAN AND DELIVERED TO THE EMPLOYMENT OFFICE OF THE PLANT WHERE EMPLOYEE WORKS WITHIN THREE (3) WORK DAYS FROM INITIAL ABSENCE CAUSED BY ILLNESS/DISABILITY OR WITHIN THREE (3) SCHEDULED WORK DAYS FOLLOWING END OF INITIAL SICK LEAVE FOR AN EXTENSION.

I. TO BE COMPLETED BY EMPLOYEE
NAME OF EMPLOYEE Tracy Ragsdale
CLOCK NO. 79032
DEPARTMENT Fitting
HOME ADDRESS P.O. Box 115 (STREET)
Black Rock, AR 72415 (CITY, STATE AND ZIP)
TELEPHONE NUMBER WHERE YOU CAN BE REACHED 878-6361
I HEREBY APPLY FOR SICK LEAVE AND AUTHORIZE MY PERSONAL DOCTOR TO FURNISH ANY MEDICAL INFORMATION TO MY EMPLOYER, EMPLOYER'S INSURANCE COMPANY OR COMPANY NURSE THAT MAY BE REQUESTED DURING THE TERM OF THIS ILLNESS OR DISABILITY.
/s/ Tracy Ragsdale
(EMPLOYEE SIGNATURE)
8-15-96
(DATE SIGNED)

II. TO BE COMPLETED BY EMPLOYEE'S ATTENDING PHYSICIAN
THIS IS TO CERTIFY THAT ON 08/21/96 (MONTH-DAY-YEAR) I EXAMINED THE ABOVE NAMED INDIVIDUAL AND I APPROVE X, DO NOT

APPROVE _, HIM/HER FOR SICK LEAVE BEGINING [sic] ON 08/21/96, I ESTIMATE THAT THE PERIOD OF DISABILITY SHOULD NOT EXCEED 30 DAYS FROM THE BEGINNING DATE OF SICK LEAVE. THIS APPROVAL IS BASED ON THE FOLLOWING DIAGNOSIS:
Hodgkin's Disease
WHICH IS IN MY OPINION, IS THE PRIMARY CAUSE FOR APPLICANT'S NEED TO BE ABSENT FROM WORK.
/s/ [Illegible]
08/08/96
(DATE SIGNED)
LOVERD M. PEACOCK, MD
JOHN K. LYNCH, DO
P.O. BOX 719,
JONESBORO, ARKANSAS 72401
501-972-4510
(PHYSICIAN'S OFFICE ADDRESS AND PHONE NUMBER)

NOTE: ABSENCE FROM WORK DUE TO ILLNESS/ DISABILITY AND FAILURE TO FURNISH THE INFORMATION REQUESTED ABOVE WILL RESULT IN TERMINATION.
NO LEAVE OR EXTENSIONS THEREOF SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.
THIS FORM IS NOT A SUBSTITUTE FOR A RETURN TO WORK SLIP.

APPROVED SICK LEAVE RECORD
EMPLOYEES OF FROLIC FOOTWEAR,
A DIVISION OF WOLVERINE WORLD WIDE, INC.

DATE 8-21-96

Tracy Ragsdale IS HEREWITH AUTHORIZED A 30 day (LENGTH/TIME) sick (TYPE) LEAVE PERIOD, ALL REQUIREMENTS BEING MET, FOR THE FOLLOWING REASONS: _____

_____

_____

SCHEDULED DATE TO RETURN TO WORK: 9-20-96

_____

/s/ _____ _____
(FOREMAN/DEPARTMENT SUPERVISOR) (DATE)

/s/ Gene Cook
(PLANT MANAGER) 8-15-96 (DATE)

/s/ Tracy Ragsdale (EMPLOYEE) 8-15-96 (DATE)
Susan Malone

THE FOLLOWING POLICIES SHALL GOVERN ALL EXTENSIONS OF LEAVE PERIODS IN FORCE:

(1) NO LEAVE SHALL BE GRANTED FOR LONGER THAN THIRTY (30) DAYS AT ANY ONE TIME.

(2) IN ORDER FOR ANY LEAVE PERIOD TO BE EXTENDED IT SHALL BE NECESSARY FOR THE EMPLOYEE TO OBTAIN ANOTHER APPLICATION FOR SICK LEAVE FROM THE EMPLOYMENT OR PLANT OFFICE WITHIN THREE (3) DAYS PRIOR TO THE CONCLUSION OF THE CURRENT LEAVE PERIOD, AND MAKE WRITTEN APPLICATION FOR AN ADDITIONAL THIRTY (30) DAYS LEAVE PERIOD. THE APPLICATION FOR SICK LEAVE

MUST BE COMPLETED, SIGNED AND DATED BY THE ATTENDING PHYSICIAN.

(3) THE APPLICATION FOR SICK LEAVE MUST BE RETURNED WITHIN THREE (3) SCHEDULED WORK DAYS OF THE CONCLUSION OF THE CURRENT SICK LEAVE PERIOD.

(4) ANOTHER COPY OF A COMPLETED APPROVED LEAVE RECORD, SIGNED AND DATED BY THE PLANT MANAGER AND FOREMAN OR SUPERVISOR, MUST BE OBTAINED BY THE EMPLOYEE PRIOR TO FINAL APPROVAL OF THE EXTENSION TO THE LEAVE.

(5) SHOULD THE EMPLOYEE FAIL TO EXTEND SICK LEAVE AS ENUMERATED ABOVE, THE EMPLOYEE MUST REPORT FOR WORK AT 7:00 A.M. OF THE NEXT SCHEDULED WORK DAY FOLLOWING THE CONCLUSION OF THE LEAVE WITH A DOCTOR'S STATEMENT PRONOUNCING THAT THE EMPLOYEE IS PHYSICALLY ABLE TO RETURN TO REGULAR WORK.

(6) IN THE EVENT A WRITTEN REQUEST FOR AN EXTENSION OF CURRENT LEAVE PERIOD IS NOT TIMELY AS ENUMERATED ABOVE, THE EMPLOYEE SHALL AUTOMATICALLY TERMINATE HIMSELF WITH LOSS OF ALL JOB RIGHTS AND PRIVILEGES. REASON STATED WILL BE LISTED AS VOLUNTARILY QUIT. ANY LEAVE OBTAINED BY FRAUD WILL RESULT IN TERMINATION FROM EMPLOYMENT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE, Plaintiff, VS. WOLVERINE WORLD WIDE, INC. d/b/a Frolic Footwear, Defendant.	)	Case No. NO. J-C-97-475

AFFIDAVIT OF ROBERT H. SMITH

(FILED JUL. 29 1998)

STATE OR ARKANSAS

COUNTY OF CRAIGHEAD

1. My name is Robert H. Smith. I am over the age of 21 and otherwise competent to testify. I am employed by Wolverine World Wide, Inc., at its Jonesboro, Arkansas plant as Director of Human Resources for its Frolic Footwear Division.

2. I am familiar with and responsible for all Company personnel and payroll records. Ms. Ragsdale was hired on March 17, 1995.

3. On February 21, 1996, Tracy Ragsdale requested medical (sick) leave. This request was granted pursuant

to the Company's leave policy and Plaintiff commenced her leave on February 21, 1996.

4. At the commencement of this leave, Ms. Ragsdale had not worked for Wolverine World Wide, Inc. for 12 months.

5. Wolverine World Wide, Inc.'s medical (sick) leave policy allowed employees with six (6) months service to take medical (sick) leave for up to seven (7) months.

6. After the commencement of her leave on February 21, 1996, Ms. Ragsdale continued on leave for seven (7) consecutive months, through September 10, 1996, when her employment was terminated.

7. Wolverine World Wide's leave policy requires that at least every thirty (30) days, employees on medical (sick) leave submit a request for an extension of leave signed by the attending physician explaining the need for the extension of the leave. This process is explained in the leave of absence section of the employee handbook and on the leave application.

8. Wolverine World Wide continues health insurance and pays the premiums on the health insurance for the first six months of leave. For the first six months of Ms. Ragsdale's leave, Wolverine World Wide continued to provide Ms. Ragsdale with health insurance, paying the premiums as provided by its policy.

9. Ms. Ragsdale first requested FMLA leave after she had been notified that her employment was terminated on September 20, 1996. At this time Ms. Ragsdale was informed that she was not eligible for FMLA, and to

the extent she was, it had been incorporated within her Company provided leave.

Further, Affiant sayeth not.

/s/ Robert H. Smith
ROBERT H. SMITH

SWORN TO AND SUBSCRIBED TO this 29th day of July, 1998.

OFFICIAL SEAL
ANGELA E. SPEED
NOTARY PUBLIC
ARKANSAS
CRAIGHEAD COUNTY
MY COMMISSION
EXPIRES 10-27-2005

/s/ Angela E. Speed
NOTARY PUBLIC

My Commission expires:

10-27-2005

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE, Plaintiff, VS. WOLVERINE WORLD WIDE, INC. d/b/a/ Frolic Footwear, Defendant.	)	Case No. NO. J-C-97-475

DEFENDANT'S STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

(Filed JUL. 29, 1998)

Pursuant to Local Rule 56.1, Defendant hereby submits the following Statement of Additional Undisputed Material Facts.

1. Plaintiff was hired on March 17, 1995 (*see* Depo. of Plaintiff, at 21; Exhibit 1 to Depo. of Plaintiff; Affidavit of Robert H. Smith).

2. Pursuant to the Company's medical (sick) leave policy, Plaintiff was entitled to seven (7) months (30 weeks) of Company-provided sick leave after six months of service (*see* Affidavit of Robert H. Smith).

3. Under the medical (sick) leave policy, Plaintiff could request a leave for up to thirty (30) days at a time.

Thereafter, the leave could be extended for thirty (30) days at a time, provided the Plaintiff presented the Company with a leave request signed by her attending physicians stating a need for the extension (*see* Exhibit 8 to Depo. of Plaintiff; Affidavit of Robert H. Smith).

4. Pursuant to the medical (sick) leave policy, on February 21, 1996 Plaintiff requested sick leave, and the leave commenced of February 21, 1996 (*see* Depo. of Plaintiff, at 29-30, 36; Exhibit 8 to Depo. of Plaintiff; Affidavit of Robert H. Smith).

5. Pursuant to the medical (sick) leave policy, on or about the following dates, March 18, 1996, April 22, 1996, May 21, 1996, June 20, 1996, July 22, 1996, and August 15, 1996, Plaintiff requested 30-day extensions of the leave which initially began on February 21, 1996 (*see* Exhibit 8 to Depo. of Plaintiff).

6. On each of the occasions listed in paragraph 5 above, Plaintiff's leave was extended for an additional 30-day period, in accordance with the medical (sick) leave policy (*see* Exhibit 8 to Depo. of Plaintiff).

7. Therefore, Plaintiff was off on medical (sick) leave for seven (7) months in accordance with the sick leave policy, from February 21, 1996 until Plaintiff's termination on September 20, 1996 (*see* Depo. of Plaintiff, at 43, 50-51; Affidavit of Robert H. Smith).

8. After Plaintiff had been on sick leave seven (7) months, she was notified that her employment had been terminated (*see* Exhibit 9 to Depo. of Plaintiff; Affidavit of Robert H. Smith).

9. On February 21, 1996, Plaintiff had not been employed by Defendant for 12 months. At the time of Plaintiff's July 22, 1996 leave request she had not worked 1250 hours within the preceding 12 months. (*see* Depo. of Plaintiff, at 21; Affidavit of Robert H. Smith).

Respectfully submitted,

WEINTRAUB, STOCK, BENNETT, GRISHAM & UNDERWOOD, P.C.

/s/ Richard D. Bennett
RICHARD D. BENNETT
(BPR #13156)

/s/ Cecilia S. Barnes
CECILIA S. BARNES
(BPR #17244)
2560 One Commerce Square
Memphis, Tennessee 38103
901-526-0431

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been sent via U.S. Mail, postage prepaid to Garland L. Watlington, 1009 S. Main, Jonesboro, Arkansas 72401 and L. Oneal Sutter, 11510 Fairview Road, Suite 200, P.O. Box 26321, Little Rock, Arkansas 72221 on this 29th day of July, 1998.

/s/ Richard D. Bennett
RICHARD D. BENNETT

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE — PLAINTIFF

VS. — CASE NO. J-C-97-475

WOLVERINE WORLDWIDE, INC. d/b/a Frolic Footwear, A Foreign Corporation doing business In the State of Arkansas — DEFENDANTS

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

(FILED AUG 13 1998)

Plaintiff Tracy Ragsdale, by and through Counsel, responds to the Defendant's Statement of Additional Undisputed Facts as follows:

1. Plaintiff admits the allegations of Paragraph One.

2. Plaintiff admits the allegations of Paragraph Two.

3. Plaintiff admits the allegations of Paragraph Three.

4. Plaintiff admits that she began leave on February 21, 1996, but denies that this is the appropriate date from which to calculate her eligibility. Plaintiff denies all other allegations in Paragraph Four.

5. Plaintiff admits that she took leave on March 18, 1996; April 22, 1996; May 21, 1996; June 20, 1996; July 22, 1996; and August 15, 1996. But Plaintiff denies that the February 21, 1996 is the appropriate date from which to calculate eligibility.

6. Plaintiff admits the allegations of Paragraph Six.

7. Plaintiff admits the allegations of Paragraph Seven.

8. Plaintiff admits the allegations of Paragraph Eight.

9. Plaintiff admits that she took leave on March 18, 1996; April 22, 1996; May 21, 1996; June 20, 1996; July 22, 1996; and August 15, 1996. But Plaintiff denies that the February 21, 1996 is the appropriate date from which to calculate eligibility.

Respectfully submitted,

HARRILL & SUTTER, P.L.L.C.
Post Office Box 26321
Little Rock, Arkansas 72221
501/224-1050 FAX: 501/223-9136
Attorneys for the Plaintiff

By: /s/ L. Oneal Sutter
L. Oneal Sutter
Arkansas bar No. 95031

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed on this, the 11 day of August to Mr. Richard Bennett, Weintraub, Stock, Bennett, Grisham & Underwood, P.C. One Commerce Square, Suite 2560, Memphis, Tennessee 38103 and to Garland L. Watlington, Attorney at Law, 1009 South Main Street, Jonesboro, Arkansas 72401.

/s/ L. Oneal Sutter
L. Oneal Sutter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE

V. NO. J-C-97-475

WOLVERINE WORLD-WIDE, INC d/b/a FROLIC FOOTWEAR — DEFENDANT

ORDER

(FILED NOV. 03, 1998)

Presently before the Court are Plaintiff and Defendant's cross-motions for summary judgment on Plaintiff's claims under the Family and Medical Leave Act and Defendant's motion for summary judgment on Plaintiff's claims under the Americans With Disabilities Act and the Arkansas Civil Rights Act.

I. Background

Plaintiff Tracy Ragsdale began her employment with Defendant Wolverine World Wide, Inc. on March 17, 1995. She was diagnosed with cancer in February of 1996, and requested medical leave from Defendant on February 21, 1996. Defendant granted her request, and her leave commenced on that date. Defendant did not notify Plaintiff of her eligibility under the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 ("FMLA"), or her right to have leave designated as FMLA leave.

Defendant's company leave policy allowed employees with six months of service to take leave for up to seven months. The leave policy required employees on

leave to submit requests for extensions of leave of every thirty days. Consistent with that requirement, Plaintiff requested extensions of her leave on March 18, April 22, May 21, June 20, July 22 and August 15 of 1996. Each request for an extension was granted by Defendant. On September 20, 1996, Plaintiff was terminated because she had exhausted her seven months of company provided leave. On September 26, 1996 Plaintiff returned to Defendant's facility and requested additional FMLA leave. She was informed that she had exhausted all of her leave. Plaintiff then requested that she be allowed to return to work on a reduced hour schedule. Her request was denied.

Plaintiff's physician released her to work in December of 1996, and she has been actively employed in full-time positions since December 31, 1996. Plaintiff is no longer being treated for cancer and she is currently capable of working without restrictions.

On December 22, 1997, Plaintiff filed suit against Defendant alleging claims under the Family and Medical Leave Act, the American's with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq* ("ADA") and the Arkansas Civil Rights Act of 1993, Ark. Code Ann. § 16-123-101, *et seq* ("Arkansas Act"). Both Plaintiff and Defendant have filed motions for summary judgment with respect to the FMLA claim. Defendant has also filed a motion for summary judgment with respect to the ADA and Arkansas Act claims.[1]

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[1] Plaintiff's motion to voluntarily dismiss her disparate treatment claims, hostile environment claims, and FMLA retaliation claim is hereby granted.

II. Summary Judgment Standard

Summary judgment is appropriate when the Court finds that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party opposing summary judgment may not rest on its pleadings but must present "significant probative evidence" demonstrating that a genuine dispute of material fact exists, and that the moving party is not entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court must view these materials in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor. *Id.* at 255. The moving party bears the initial burden of informing the court of the basis for the motion and of identifying those parts of the record which demonstrate absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met its burden, the nonmovant may not rely on conclusory allegations or mere conjecture, but rather must offer specific facts to support a verdict in its favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (construing Fed. R. Civ. P. 56(e)). As to any claim, or essential element thereof, for which the nonmoving party bears the burden of proof at trial, the nonmoving party must make a showing sufficient to establish the existence of that claim or element.

III. Discussion

A. Plaintiff's FMLA Claim

The FMLA provides eligible employees the benefit of leave time for family and medical emergencies. The FMLA provides that employers must allow employees up to twelve weeks of leave in a year if the leave is requested for one of the purposes specified in the statute, including an employee's "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). At the end of the leave, the employee must be reinstated to his or her position or to a position equivalent in pay, benefits, and other terms and conditions of employment. *See* 29 U.S.C. § 2614(a)(1). In the present case, there is no dispute that Plaintiffs' bout with cancer was a "serious health condition" within the purview of the Act. There is also no dispute that Plaintiff provided proper notice to Defendant of her need for medical leave, and that Defendant was fully informed as to the nature of Plaintiff's condition so that Defendant could have determined Plaintiff's eligibility under the FMLA. Thus, the only issues to be determined are (1) whether Plaintiff was an eligible employee, and (2) whether Defendant violated the FMLA in failing to provide her with 12 additional weeks of FMLA leave and reinstatement.

1. *Plaintiff's Eligibility*

The FMLA defines the term "eligible employee" as one who has been employed (i) for at least 12 months by the employer with respect to whom leave was requested . . . ; and (ii) for at least 1,250 hours of service

with such employer during the previous 12-month period. 29 U.S.C. § 2611(2)(A). In other words, to be eligible an employee must have been employed "for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave." 29 C.F.R. 825.110(a)(2). When Plaintiff first requested leave on February 21, 1996, she had not been employed by Defendant for the requisite twelve-month period. Thus, she was ineligible. When Plaintiff subsequently requested an extension of her leave on March 18, 1996, she had met all of the requirements for eligibility under the FMLA.

Plaintiff contends that her eligibility under the FMLA should have been determined as of her March 18, 1996 request for leave. Defendant, on the other hand, argues that eligibility for FMLA leave must only be determined on the date that leave first commenced (in this instance February 21, 1996). Defendant contends that Plaintiff's March 18, 1996 request was merely a request for an extension of leave that had already commenced on February 21, 1996. Consequently, Defendant argues that Plaintiff was not an eligible employee afforded the protections of the FMLA.

There are cases holding that eligibility under the FMLA is determined at the time when leave is first granted. *See, e.g., Barron v. Runyon,* 11 F. Supp. 2d 676 (E.D. Va. 1998); *Lacoparra v. Pergament Home Centers, Inc,* 982 F. Supp. 213 (S.D.N.Y. 1997). These cases primarily involved intermittent leave situations, where an employee took leave at various periods in between periods of employment. The defendants argued that an

employee who was initially eligible for leave could thereafter lose her FMLA eligibility for subsequent leave requests if the employee's qualifications dropped below the threshold requirements. Essentially, these Defendants argued that an employee had to establish her eligibility at the beginning of every request for leave, regardless of whether the employee was initially eligible, and regardless of whether the request was for the same condition. The courts considering this argument have appropriately rejected it. Once an employee establishes eligibility under the FMLA for a particular condition, she should not be required to re-establish eligibility for each subsequent request for intermittent leave.

However, in the present case, Defendant seeks to misapply these holdings. Defendant argues that an employee's eligibility under the FMLA is calculated once, and only once – at the time the employee first takes leave for a medical condition. According to Defendant, an employee beset by a serious medical condition before she has met the threshold requirements for eligibility can never be eligible for the protections of the FMLA if *any* leave is taken before the statutory requirements are met. Thus, under Defendant's theory, if an employee was diagnosed with cancer after working 11 months and 29 days and then took leave on that date, she would be forever barred for receiving FMLA benefits related to that particular bout with cancer. However, if the same employee waited two days before taking her leave, she would be afforded the full protection of the FMLA. In the opinion of the Court, this construction of the eligibility requirements does not make sense. Certainly FMLA eligibility may not be stripped away, but that does not necessarily

mean that eligibility could not be subsequently acquired through the passage of time.

In this case, Plaintiff first requested leave when she was ineligible for FMLA benefits. She then requested additional leave one month later when she was eligible. Accordingly, Plaintiff was entitled to the protections afforded by the FMLA.[2]

2. *FMLA Violation*

Defendant admits that it never informed Plaintiff of her FMLA eligibility following her requests for leave, and also never designated in writing that Plaintiff's leave was to be counted against her FMLA entitlements. Plaintiff points to the regulations, arguing that liability has been established.

The regulations promulgated by the Department of Labor clearly place the burden upon the employer to inform an employee whether leave is designated as FMLA leave. *See* 29 C.F.R. § 825.208 ("in all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section"). According to the regulations:

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[2] In light of this ruling, the Court need not consider whether Plaintiff would have been "deemed eligible" under 29 C.F.R. § 825.110(d). The Court notes, however, that there is persuasive authority finding this regulation invalid because it is inconsistent with the text and intent of the FMLA. *See Wolke v. Dreadnought Marine, Inc.*, 954 F.Supp. 1133, 1134 (E.D. Va. 1997).

> If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 CFR § 825.208. The regulations further state that "if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).

Based upon the plain language of the regulations, it would appear that there is no genuine issue of material fact as to whether Defendant violated the Act. However, Defendant argues that under the facts of this case, no violation can be found as a matter of law because Defendant provided Plaintiff more leave than required by the FMLA, as well as all of the other protections contained in the FMLA.

Indeed, the undisputed facts demonstrate that Defendant's employee leave program was far more generous than the baseline established by the FMLA. Under Defendant's company leave program, Plaintiff was allowed a

maximum of 30 weeks of company leave, which she exhausted in full. During this time, Defendant maintained Plaintiff's health insurance benefits, and even exceeded the requirements of the FMLA by paying Plaintiff's insurance premiums for six months. Defendant also held Plaintiff's position open for her during the entire 30 weeks of leave. According to Defendant, these facts preclude any liability for technical violation of the Act or the Regulations.

There is an abundance of case law supporting Defendant's position. Several courts have directly held that there could be no FMLA violation where an employee was provided greater than twelve weeks of leave. *See, e.g., Haggard v. Farmers Ins. Exchange*, 1996 WL 146048 (D. Or. 1996); *Kur v. Fox Valley Press, Inc*, 1997 WL 89140 at *3-4 (N.D. Ill. 1997). These particular courts have based their holdings on the text of the FMLA itself, without consideration of the regulations. However, one court that did consider the regulations reached the same result, concluding that the regulations impermissibly conflicted with the FMLA. *See Cox v. AutoZone, Inc.*, 990 F. Supp. 1369 (M.D. Ala. 1998). In *Cox*, the defendant's company leave policy allowed for employees to take 13 weeks of paid leave. The plaintiff took 15 weeks of leave due to her pregnancy, but the defendant failed to designate the leave as FMLA qualifying. When plaintiff was denied a return to her original position at the end of the 15 weeks, she argued that she was still entitled to an additional 12 weeks of FMLA leave.

The court's description of the plaintiffs' position in *Cox* is identical to the position advanced by Plaintiff here:

> Plaintiff is, in effect, converting FMLA from a statute which provides a minimum, a baseline, of federally mandated unpaid leave, into a statute which mandates an additional 12 weeks of leave for all employees, even those who already have employer provided leave. This is inconsistent with the text and guarantees of the statute.

Cox, 990 F. Supp. at 1373. The court then undertook an extensive analysis of the legislative intent behind the FMLA and the glaringly inconsistent regulations adopted by the Department of Labor. The court found "a clear intent of Congress to protect only those workers who take 12 or fewer weeks of leave." *Id.* at 1380. With respect to the regulations, the court found that they "added requirements which not only go beyond those of the statute, but which are inconsistent with the stated purpose of the statute and which would grant entitlements which were not given by Congress." *Id.* 1381. The court ultimately granted summary judgment for the defendant.

The Court finds the reasoning in *Cox* persuasive and squarely applicable to the present case. Here, Plaintiff took 30 weeks of company provided leave and reaped additional benefits far exceeding those provided by the FMLA. Accordingly, she was not entitled to an additional 12 weeks of FMLA leave. Plaintiffs' motion for summary judgment as to liability on her FMLA claim is hereby denied. Defendant's motion for summary judgment on Plaintiffs' FMLA claim is hereby granted.

B. Plaintiffs' ADA and Arkansas Civil Rights Act Claims for Failure to Accommodate[3]

The ADA prohibits an employer from discriminating against an employee "because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). As defined by the ADA, "discrimination" includes:

> Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the . . . [employer's] business.

Id. § 12112(b)(5)(A). "Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). "[O]therwise qualified" means that the individual, "with or without reasonable accommodation, can perform the essential functions of the employment position that such

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[3] The Court will look to case law interpreting the ADA in assessing Plaintiff's failure to accommodate claim under the Arkansas Act. While the Arkansas Act does not specifically address the right to an accommodation of a physical or mental disability, it does refer to the right of an "otherwise qualified person" to "obtain and hold employment without discrimination." Ark. Code Ann. § 16-123-107.

individual holds or desires." *Id.* § 12111(8). Thus, to establish a claim under the ADA, Plaintiff must show (1) that she has a disability; (2) that she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) that she has suffered adverse employment action because of her disability. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995) (*citing Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995)).

Plaintiff contends that her ADA failure to accommodate claim is not subject to the burden shifting analysis set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), citing a Seventh Circuit case, *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996). Although this issue has not been directly addressed by the Eighth Circuit, the rationale expressed in *Bultemeyer* is persuasive.[4] This case is not a disparate treatment case, and the *McDonnell-Douglas* burden shifting method seems unnecessary and inappropriate. As in *Bultemeyer*, Plaintiff's claim "alleges facts which, if proven, could directly establish a violation of the ADA." *Id.* at 1283. Furthermore, the reason for the discharge is not disputed. Defendant admits that it terminated Plaintiff after she exhausted her company leave (due to her cancer) and could not return to work. Accordingly, there should be no

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[4] In *Dush v. Appleton Electric Co.*, 124 F.3d 957 (8th Cir. 1997), the Eighth Circuit did cite with approval the use of the burden shifting analysis in *Price v. S-B Power Tool*, 75 F.3d 362 (8th Cir. 1996). However, *Price* was a disparate treatment case, and the issue of whether burden shifting was appropriate in a failure to accommodate case was not raised in either *Dush* or *Price*.

need for indirect proof or burden shifting, and the Court will not apply that framework here. But regardless of what standard is used, Plaintiff must still demonstrate a genuine issue of material fact with respect to each element of her claim.

Defendant first contends that summary judgment is warranted because there is no genuine issue of material fact that Plaintiff is not "disabled" within the meaning of the ADA. Defendant points primarily to the fact that Plaintiffs' cancer is now in remission and that Plaintiff has been gainfully employed since December of 1996.

The ADA defines "disability" as a "physical or mental impairment that substantially limits" one or more of the major life activities of the individual claiming to have a disability. 42 U.S.C. § 12102(2). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(i), as well as "sitting, standing, lifting [and] reaching." 29 C.F.R. § 1630 app.

The record indicates Plaintiff underwent extensive radiation therapy for her cancer during the months prior to her dismissal. The record also indicates that, at least for a significant period of time, Plaintiff was "substantially limited" in many of her life activities. *See* Affidavit of Plaintiff (submitted as Exhibit "A" to Plf.'s Resp. to Def.'s Stmt. of Undisputed Material Facts). Furthermore, although Plaintiff's cancer is now in remission, her disability is to be evaluated as of the time of the employment decision. *Moore v. Payless Shoe Source*, 139 F.2d 1210 (8th Cir. 1998). After a thorough review of the record, the

Court believes that there are genuine issues of material fact as to whether Plaintiff is disabled. Accordingly, summary judgment with respect to this issue would not be appropriate.

Defendant next contends that summary judgment is appropriate because Plaintiff cannot show that she was qualified to perform the essential functions of her job, with or without accommodation, nor can she demonstrate that she requested an accommodation prior to her termination. The Eighth Circuit recently stated that "an employee who is 'unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones.' " *Moore v. Payless Shoe Source*, 139 F.3d 1210 (8th Cir. 1998) (*quoting Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir.1997)); *see also Foremanye v. Board of Community College Trustees*, 956 F.Supp. 574, 578-79 (D. Md. 1996); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (employee who, at time of termination, could not attend work due to medical condition was not "qualified" under the ADA).

Here, the undisputed material facts demonstrate that Plaintiff was not "otherwise qualified" at the time of her termination. Plaintiff commenced medical leave pursuant to Defendant's leave program on February 21, 1996, and continued on medical leave for 7 months. *See* Def.'s Statement of Undisputed Material Facts ¶¶ 4-7 (admitted). Plaintiff requested six 30-day extensions of her medical leave. *Id.* ¶ 7 (admitted). On each leave request, Plaintiff's physicians stated that Plaintiff was unable to perform any

work for the length of the requested leave. *Id.* ¶ 8 (admitted). For six months of Plaintiff's leave, Defendant continued to provide Plaintiff with health insurance, paying the premiums consistent with its policy. *Id.* ¶ 9 (admitted). On August 8, 1996, Plaintiff was notified of her rights to Cobra insurance continuation, but opted not to obtain Cobra coverage because she could not afford the premiums. *Id.* ¶ 10 (admitted). Plaintiff's employment with Defendant was terminated on September 20, 1996, because she had exhausted all of her company leave. *Id.* ¶ 11 (admitted). Plaintiff requested additional leave or, in the alternative, a reduced-work schedule on September 26, 1996, six days after her termination. *Id.* ¶¶ 11-13 (admitted).

In light of these facts, there exist no genuine issues of material fact as to whether Plaintiff was qualified to perform the essential functions of her job at the time of her termination. Plaintiff was completely unable to work for seven months prior to her termination, and she exhausted all of her company provided leave. There are absolutely no facts in the record to demonstrate that, on the date of Plaintiff's termination, Defendant had any reason to believe that Plaintiff was able to return to work or would have been able to return in the near future. In fact, the undisputed facts clearly demonstrate that she could not have returned to work. Plaintiff's physician did not release her to work until December of 1996, several months after her termination. *Id.* ¶ 14 (admitted). Furthermore, it is clear that there was no reasonable accommodation that would have allowed Plaintiff to perform the essential functions of her employment in light of the fact that she could not work at all. Employers are not

required to accommodate employees by allowing them indefinite leave.[5] *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir.1995); *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir.1996); *Watkins v. J & S Oil Co.*, 977 F. Supp. 520, 526 (D. Me. 1997). As stated by the court in *Meyers*:

> [The ADA] contain[s] no reference to an individual's future ability to perform the essential functions of his position. To the contrary, [it is] formulated entirely in the present tense, framing the precise issue as whether an individual "can" (not "will be able to") perform the job with reasonable accommodation.

Meyers, 50 F.3d at 283. And Finally, Plaintiff did not request her alleged accommodations of additional leave or a reduced work-schedule until six days following her termination. Defendant simply cannot be held liable for failing to provide an accommodation that was not requested until after Plaintiff's termination.

In sum, the ADA does not require employers to be omniscient, nor does it require employers to indefinitely maintain employees on extended medical leave. If an employee seeks to invoke the protections of the ADA, she must at a minimum produce facts demonstrating that she could have performed the essential functions of her employment with an accommodation, and that she requested the accommodation *prior* to her termination. In this instance the record conclusively demonstrates that Plaintiff could not (and in fact did not) meet these

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[5] This principle particularly applies in this instance because Plaintiff had already exhausted seven full months of leave at the time of her termination.

requirements. Accordingly, Defendant's motion for summary judgment with respect to Plaintiff's ADA and Arkansas Civil Rights Act claims is hereby granted.

IV. Conclusion

In accordance with the above, Plaintiff's motion for partial summary judgment (Docket #21) is DENIED. Defendant's cross-motion for partial summary judgment (Docket #33) is GRANTED. Defendant's second motion for partial summary judgment (Docket #47) is GRANTED. Judgment shall be entered forthwith dismissing Plaintiff's claims in their entirety. All other pending motions are hereby DENIED as moot.

IT IS SO ORDERED this 3 day of November, 1998.

/s/ James M. Moody
James M. Moody
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE PLAINTIFF

V. NO. J-C-97-475

WOLVERINE WORLDWIDE, INC DEFENDANT
d/b/a FROLIC FOOTWEAR

JUDGMENT

(Filed Nov. 3, 1998)

On November 3, 1998, the Court entered an Order granting Summary Judgment with respect to each remaining claim set forth in Plaintiffs' Second Amended Complaint.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Plaintiffs' Complaint is hereby dismissed with prejudice in its entirety.

IT IS SO ORDERED this 3 day of November, 1998.

/s/ James M. Moody
James M. Moody
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE PLAINTIFF

V. CASE NO. J-C-97-475

WOLVERINE WORLDWIDE, INC.
d/b/a FROLIC FOOTWEAR DEFENDANT

ORDER

(Filed Aug. 5, 1999)

Plaintiff's Motion to Alter or Amend is denied (#67). *See McGregor v. Autozone, Inc.*, ___ F.3d ___, 1999 WL 496230 (11th Cir. 1999) (regulation requiring employers to notify employee that an absence is being counted as FMLA leave before employer can use leave against the 12 week entitlement of the Family Medical Leave Act ("FMLA") is invalid because it converts FMLA's minimum of federally mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless employer specifically and prospectively notifies the employee that he or she is using FMLA leave).

IT IS SO ORDERED this 3 day of Aug., 1999.

/s/ James M. Moody
James M. Moody
United States District Judge

[Mailing Certificate Omitted in Printing]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3319

Tracy Ragsdale; Warren E. Depwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate,	*	
Appellants,	*	3:97 CV 00475
v.	*	Appeal from the United States District Court for the Eastern District of Arkansas.
Wolverine Worldwide, Inc., doing business as Frolic Footwear, a foreign corporation doing business in the State of Arkansas,	*	(Filed Sept. 14, 2000)
Appellee.	*	

Submitted: April 12, 2000
Filed: July 11, 2000

Before: WOLLMAN, Chief Judge, MAGILL, Circuit Judge, and FRANK,* District Judge.

MAGILL, Circuit Judge.

This appeal considers the validity of certain regulations promulgated by the Department of Labor (DOL)

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* The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota, sitting by designation.

under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601, *et seq*. The appeal arises out of a suit brought by Tracy Ragsdale against Wolverine Worldwide, Inc. (Wolverine) under the FMLA, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, *et seq*, and the Arkansas Civil Rights Act of 1993 (Arkansas Act), Ark. Code Ann. § 16-123-101, *et seq*, alleging that Wolverine improperly denied her FMLA leave and terminated her in violation of the FMLA, ADA, and Arkansas Act. Ragsdale appeals the district court's[1] grant of summary judgment to Wolverine on her FMLA claim. We affirm the judgment of the district court.

I. BACKGROUND

The relevant factual background of this case is relatively simple. Ragsdale began her employment with Wolverine on March 17, 1995. She was diagnosed with cancer in February 1996 and requested medical leave from Wolverine on February 21, 1996. Wolverine granted her request, and Ragsdale's leave commenced on that date.

Wolverine's leave policy allowed employees with six months of service to take leave for up to seven months. The leave policy required employees on leave to submit requests for extensions of leave every thirty days. Consistent with that requirement, Ragsdale requested extensions of her leave on March 18, April 22, May 21, June 20, July 22, and August 15 of 1996. Each request for an extension was granted by Wolverine. Wolverine did not,

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[1] The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

however, notify Ragsdale of her leave eligibility under the FMLA or her right to have leave designated as FMLA leave.

On September 20, 1996, Ragsdale was terminated because she had exhausted her seven months of company provided leave and was unable to return to work. On September 26, 1996, Ragsdale returned to Wolverine and requested additional FMLA leave. She was informed that she had requested and utilized all of her available leave. Ragsdale then requested that she be allowed to return to work on a reduced hour schedule. Wolverine denied her request. Ragsdale's physician released her to work in December of 1996, and she has been actively employed in full-time positions since December 31, 1996. Ragsdale is no longer being treated for cancer and is currently capable of working without restrictions.

On December 22, 1997, Ragsdale filed suit against Wolverine alleging claims under the FMLA, ADA and Arkansas Act. On November 3, 1998, the district court granted summary judgment to Wolverine on Ragsdale's FMLA claim. The court found that the DOL's regulations, which provide that unless the employer prospectively designates company leave as FMLA leave, the twelve week FMLA leave entitlement does not begin to run, are based on an erroneous interpretation of the FMLA and cannot be enforced. The district court also dismissed Ragsdale's ADA and Arkansas Act claims, holding that Ragsdale was not qualified to perform the essential functions of her job at the time of her termination. Subsequently, Ragsdale filed the present appeal.

II. ANALYSIS

Ragsdale claims that the district court erred in invalidating the DOL's regulations and dismissing her FMLA claim. She claims that because Wolverine never formally designated any of the seven months of company leave as FMLA leave, DOL regulations properly mandate that the clock never began to run on her FMLA leave. Thus, Ragsdale contends that she was denied twelve weeks of FMLA designated leave, and that she remained entitled to be restored to her position through December 1996 when she was able to return to work. Wolverine concedes that it did not formally designate Ragsdale's leave as FMLA-qualifying but argues that the DOL regulations are invalid because they impermissibly expand the scope of rights conferred on employees under the FMLA. We review the district court's grant of summary judgment de novo. *See Sahulka v. Lucent Tech., Inc.*, 206 F.3d 763, 767 (8th Cir. 2000).

A. Chevron Standard of Review

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court explained the analysis that a court must utilize when reviewing agency decisions which apply or interpret a statute that the agency administers. The *Chevron* test has two parts. First, a reviewing court must determine whether congressional intent is clear from the plain language of the statute. *See id.* at 842-43. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the

language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citation omitted). When an analysis of the statute reveals a clear congressional intent, an agency interpretation of the statute contrary to that intent is not entitled to deference. *See id.* A court must not defer when, it "appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845. If, however, the language of the statute is ambiguous, and the legislative history reveals no clear congressional intent, a reviewing court must defer to a reasonable agency interpretation of the statutory provision. *See id.* at 843. In all cases, although the level of deference afforded an agency interpretation may appear high, the court remains the final authority in matters of statutory interpretation and "must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

B. Department of Labor Employer Notice Regulations

Subchapter I of the FMLA sets forth the FMLA's substantive provisions. An employee is eligible for FMLA leave if she has worked for a covered employer[2] for at least 1,250 hours during the preceding twelve months. *See* 29 U.S.C. § 2611(2)(A)(ii). The FMLA provides that an eligible employee shall be entitled to a total of twelve workweeks of leave during any twelve-month period for

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[2] The reach of the FMLA is relatively limited. It only applies to, among other entities, private-sector employers of fifty or more employees. *See* 29 U.S.C. § 2611(4)(A)(i).

one or more of the following reasons: (1) the birth of the employee's child, (2) the placement of a child with the employee for adoption or foster care, (3) taking care of certain relatives with "serious health condition[s]," and (4) when the employee herself cannot "perform the functions" of her position because she suffers from a "serious health condition." *See* 29 U.S.C. § 2612(a)(1). After an employee has taken FMLA leave, the employee is entitled to full restoration of her prior position or restoration to an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1).

The FMLA directs the Secretary of Labor to, *inter alia*, "prescribe such regulations as are necessary to carry out subchapter I." 29 U.S.C. § 2654. Although the FMLA does not itself require that the employer designate leave as FMLA leave, the DOL regulations do require such designation. Seizing on the lack of employer notice provisions in the text of the statute, the DOL has issued a series of regulations requiring that an employer provide an employee with notice that company leave is FMLA leave both in situations where the employee is taking paid leave and where the employee is taking unpaid leave and providing for severe consequences for the failure to give employees such notice. The DOL has mandated that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. . . . " 29 C.F.R. § 825.208(a). In two separate regulations, the DOL provides that failure to notify an employee that leave taken pursuant to the company leave policy is also designated as FMLA leave will

result in the employee still retaining her twelve week FMLA "entitlement." In 29 C.F.R. § 825.208(c), the DOL applies the principle to paid leave under an employer provided leave program, stating:

> If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employer either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 C.F.R. § 208(c). The DOL also applies the principle to unpaid employer provided leave, stating: "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).

As stated above, the issue before the court is whether the above-quoted DOL regulations are a permissible interpretation of the FMLA. Recently, several courts have addressed this precise question and have come to differing conclusions, resulting in a split of authority. *Compare McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11th Cir. 1999) (striking down the regulations because they improperly

expand the substantive guarantees of the statute); *Schloer v. Lucent Tech., Inc.*, 2000 WL 128698 (D. Md. 2000) (same); *Neal v. Children's Habilitation Ctr.*, 1999 WL 706117 (N.D. Ill. 1999) (same); *Donnellan v. New York City Transit Auth.*, 1999 WL 527901 (S.D.N.Y. 1999) (criticizing the regulations but finding for the employer on narrower ground); *with Plant v. Morton Int'l, Inc.*, 2000 WL 572458 (6th Cir. 2000) (distinguishing between notice requirements for paid as opposed to unpaid leave but appearing to uphold both 29 C.F.R. §§ 825.208(c) and 825.700(a) as valid exercises of regulatory power); *Ritchie v. Grand Casinos of Mississippi, Inc.*, 49 F.Supp.2d 878 (S.D. Miss. 1999) (holding that the DOL's regulations appropriately "filled the gaps" of the FMLA); *Chan v. Loyola Univ. Med. Ctr.*, 1999 WL 1080372 (N.D. Ill. 1999) (same).

We agree with the Eleventh Circuit that the DOL's regulations improperly "convert[ ] the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave." *McGregor*, 180 F.3d at 1308. The FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires. The provisions of the FMLA are noticeably bereft of any purpose to interfere with employer leave policies which grant greater leave rights than the FMLA or to require more generous leave plans than the minimum twelve weeks of unpaid leave mandated by the FMLA. *See* 29 U.S.C. § 2652(a) ("Nothing in this Act or any amendment made by this Act shall be construed to

diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act"); 29 U.S.C. § 2653(b) ("Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."); 29 U.S.C. § 2612(d)(2)(B) ("nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave").

The terms of the statute contemplate only that the employer will be required to provide a "total" of twelve weeks of unpaid leave. Entirely absent from the text of the FMLA is any indication that the FMLA was designed to entitle an employee to additional leave under the FMLA when the employer's leave plan already provides for twelve weeks of FMLA qualifying leave. *See* 29 U.S.C. § 2612(a)(1) ("employee shall be entitled to a *total* of 12 workweeks of leave during any 12-month period") (emphasis supplied); 29 U.S.C. § 2612(d)(1) ("If an employer provides paid leave for fewer than 12 workweeks, the *additional* weeks of leave *necessary to attain the 12 workweeks* of leave . . . may be provided without compensation") (emphasis added).

The FMLA does define the relationship between FMLA leave and employer-provided paid leave when an

employee takes leave that qualifies as FMLA leave. It provides:

> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee . . . for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

29 U.S.C. § 2612(d)(2)(B). The obvious purpose of § 2612(d)(2)(B) is to ensure that neither an employee nor an employer will be disadvantaged by the existence of the FMLA. The provision enables the employee to take advantage of *paid* employer-provided leave that the employee would be entitled to regardless of the existence of the FMLA. The provision also protects the employer; if an employee requests FMLA leave, the employer can require that the employee also use employer-provided leave thereby, if providing at least twelve weeks of leave, saving itself from having to extend more leave than provided for in its leave policy. The DOL has failed to appreciate and differentiate those circumstances when notice should be required from employers in order to protect employees' substantive FMLA rights from those situations where notice is not necessary to protect FMLA rights. Rather than simply recognizing that the purpose of § 2612(d)(2)(B) was to disadvantage neither employer nor employee by the existence of the FMLA when the employer already has a sufficient leave policy in place, the Secretary of Labor has apparently seized upon the

"employer may require" provision in § 2612(d)(2)(B) to justify the imposition of a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave.

Other sections of the FMLA strongly support the view that where Congress desired explicit notice provisions with significant consequences for their violation, it provided for them in the text of the statute. In 29 U.S.C. § 2612(e)(1), the statute details notice obligations of employees to employers when the employee requests qualifying leave under the FMLA. *See Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997) (holding that an employee merely informing the employer that he would be out and did not know when he would return and offering no further information was not adequate notice under the FMLA). In 29 U.S.C. § 2614(b)(1)(A), the FMLA allows an employer to refuse to restore a "highly compensated employee" to his or her former position if holding open the position would cause "substantial and grievous economic injury to the operations of the employer." 29 U.S.C. § 2614(b)(1)(A). In order to do so, however, the employer must give notice to the employee "at the time the employer determines such injury would occur" that the employer does not intend to restore the employee to his or her position. *See* 29 U.S.C. § 2614(b)(1)(B); *see also* 29 U.S.C. § 2619 (assessing monetary penalties for employers who do not post notices on the premises of the employer explaining FMLA rights).

Similar to the statutory text, the FMLA's legislative history supports the view that the FMLA was intended only to be a statute that provided a minimum labor standard; an assurance that employers would provide

employees with twelve weeks of leave every year. *See* S. Rep. No. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 6 (stating that the FMLA "accommodates the important societal interest in assisting families, by establishing a minimum standard for leave. The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment"); S. Rep. No. 103-3, at 28 (1993), *reprinted in* U.S.C.C.A.N. 3, 30 ("Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis"). Any other view of the statute would likely upset the careful compromise reached by Congress when it passed the FMLA. *See* H. R. Rep. No. 135(1), at 37 (1991) ("The amount of time available for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees' perspective, a twelve week minimum represents a middle ground between the family needs of workers and an employer's business needs.").

The DOL regulations must be struck down. Although courts must defer to agency expertise, this Court cannot abrogate its mandate as the "final authority on issues of statutory construction" and must "reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. The DOL regulations create rights which the statute clearly does not confer.

While the statute only requires the employer to provide twelve weeks of unpaid leave, under the DOL regulations, the employer could be forced to provide much more leave. The FMLA was intended to "balance the demands of the workplace with the needs of families," 29 U.S.C. § 2501(b)(1), "in a manner that accommodates the legitimate interests of employers," 29 U.S.C. § 2601(b)(3). The DOL regulations dispense with any pretense of balancing in favor of rigid and unnecessary regulations that penalize unwary employers.

It should be stressed that the court is not holding that any DOL regulations requiring employers to designate leave as FMLA leave would be invalid. There are various situations in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights. For example, notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks. *See Longstreth v. Copple*, 189 F.R.D. 401 (N.D. Iowa 1999). Also, in some cases where the leave was anticipated, an employer's failure to provide notice that the leave counts against the FMLA entitlement could interfere with the employee's ability to plan and use future FMLA leave.

Although some situations may require employer notice, this case is not one of them. The DOL regulations improperly convert the FMLA into a statute which always provides an additional twelve weeks of leave unless the employer specifically notifies the employee prospectively that she is using her FMLA leave. This is

not consistent with the purpose of the FMLA. Congress only intended to mandate a minimum of twelve weeks of leave for employees, it did not intend to construct a trap for unwary employers who already provide for twelve or more weeks of leave for their employees. It is undisputed that Wolverine's employee leave program was far more generous than the baseline established by the FMLA. Under Wolverine's leave program, Ragsdale was allowed a maximum of thirty weeks of company leave, which she exhausted in full. During this time, Wolverine maintained Ragsdale's health insurance benefits, and even exceeded the requirements of the FMLA by paying Ragsdale's insurance premiums for six months. Moreover, Wolverine held Ragsdale's position open for her during the entire thirty weeks of leave.

Ragsdale's medical condition rendered her unable to work for substantially longer than the FMLA twelve-week period. To find that Wolverine's technical violation of the designation regulations functions as a denial of Ragsdale's FMLA rights would be an egregious elevation of form over substance; a result clearly not contemplated by the FMLA. In this case, the regulations directly contradict the statute by increasing the amount of leave that an employer must provide. Consequently, this court must hold 29 C.F.R. § 825.700(a) invalid insofar as it purports to require an employer to provide more than twelve weeks of leave time.

III. CONCLUSION

In sum, we affirm the district court's judgment holding that the DOL regulations are not based on a permissible interpretation of the FMLA and that, consequently, Ragsdale's FMLA claim must be dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Supreme Court of the United States

No. 00-6029

Tracy Ragsdale,

Petitioner

v.

Wolverine Worldwide, Inc.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorai be, and the same is hereby, granted limited to the question presented by the Solicitor General in his brief for the United States as amicus curiae.

June 25, 2001

PETITIONER'S

BRIEF

QUESTION PRESENTED

Whether the Secretary has acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the Act's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave?

PARTIES

The petitioners are Tracy Ragsdale and Warren E. Dupwe, trustee in bankruptcy for the Tracy Ragsdale estate. The respondent Wolverine Worldwide, Inc., in connection with the events giving rise to this action, was doing business as Frolic Footwear.

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The November 3, 1998, decision of the district court, which is not reported, is set out at pp. 83-100 of the Joint Appendix. The August 5, 1999, order of the district court, which is not reported, is set out at p. 101 of the Joint Appendix. The July 11, 2000, decision of the court of appeals, which is reported at 218 F. 3d 933 (8th Cir. 2000), is set out at pp. 102-106 of the Joint Appendix.

JURISDICTION

The decision of the court of appeals was entered on July 11, 2000. A timely petition for rehearing and suggestion for rehearing en banc was denied on August 8, 2000. The petition for a writ of certiorari was filed on September 5, 2000. This Court granted certiorari on June 25, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in an appendix to this brief.

STATEMENT OF THE CASE

On March 17, 1995, petitioner began her employment with respondent Wolverine Worldwide, Inc. For almost a year she worked assembling shoes at a division of the company known as Frolic Footwear. Petitioner was paid

on a piecework basis, and earned approximately $6.00 an hour.

In February, 1996, Ragsdale was diagnosed with Hodgkins disease. She underwent surgery for the removal of her spleen. From March through August 1996, Ragsdale underwent radiation treatments five days a week for her cancer. As a result of the surgery and radiation, Ragsdale was, for a substantial period of time, unable to work.

At the time of the surgery Ragsdale was not yet eligible for leave under the Family Medical Leave Act because she had not worked for Wolverine Worldwide for a full year. Wolverine's leave policies, embodied in a collective bargaining agreement,[1] did not provide any paid sick leave or any paid personal leave. Workers with less than 25 years experience could only take vacation leave when the plant closed in July and December; because she had then worked for Wolverine less than a year, Ragsdale was not yet entitled to any vacation. The company, however, did permit workers to take up to seven months of unpaid sick leave, provided that they submitted every 30 days a request for an extension of that leave. On February 21, 1996, Ragsdale requested and was granted unpaid sick leave under this employer-sponsored policy. During the first six months of this period Ragsdale continued to be covered by the employer's health insurance plan.

When in September of 1996 Ragsdale returned to the plant to request another extension of her sick leave, she

[1] Deposition of Tracy Ragsdale, Ex. 1.

was advised that no further extensions would be granted, and that she would be dismissed if she did not resume work by September 20, 1996. Although the company policy also permitted unpaid personal leave, she was not offered that. Ragsdale requested that she be given leave under the Family Medical Leave Act. There is conflicting evidence about how the company responded. According to Ragsdale, her foreman, the plant manager, and one other official all denied familiarity with the FMLA, and never replied to her request for FMLA leave.[2] Another Wolverine official, however, asserted that Ragsdale "was informed that she was not eligible for FMLA, and to the extent she was, it had been incorporated within her company provided leave."[3] Wolverine did not claim, however, that any company official, prior to September 1996, had notified Ragsdale that she was, or might be, utilizing FMLA leave. Although 29 C.F.R. § 825.301(c) requires an employer to provide certain information to any employee who qualifies for FMLA leave, Wolverine never provided that information to Ragsdale either. It is undisputed that in September 1996 Wolverine refused to permit Ragsdale to take leave under the FMLA.

Faced with this demand that she return to work or face dismissal, Ragsdale consulted her physician. He advised Ragsdale that she needed to conserve her strength to recover from the radiation treatments, but that she could resume work for four hours a day. Ragsdale asked the company if she could return to work on that reduced schedule, but the employer rejected her request.

[2] Deposition of Tracy Ragsdale, p. 40.

[3] Affidavit of Robert H. Smith, p. 2 ¶ 9.

Ragsdale asserted that other workers had been permitted to work four hours a day, a contention that the company disputed.[4] In any event, Ragsdale was dismissed on September 20, 1996.

Ragsdale resumed work for another employer by mid-December 1996, prior to the point when 12 weeks of FMLA leave granted on September 20, 1996 would have ended. Her cancer has not recurred. As a result of medical bills and loss of income caused by her illness, however, Ragsdale went bankrupt.[5]

Ragsdale, together with the trustee of her estate in bankruptcy, brought this action in federal district court in 1997. The complaint asserted, inter alia, that Wolverine had violated the FMLA. Petitioners relied on regulations issued by the Secretary of Labor regarding workers on leave under an employer-provided leave plan. Sections 825.208 (App. 2), 825.301(b)(1) (App. 8) and 825.700(a) (App. 8) of those regulations provide in such a situation that a period of leave does not count as part of an employee's 12-week FMLA entitlement until and unless the employer notifies the employee that it has designated the leave as FMLA leave. Since Wolverine admittedly had not made such a designation or provided such notice, petitioners argued, Ragsdale was still entitled to 12 weeks of FMLA leave when her employer-provided leave ended in September 1996.

The employer moved for summary judgment on two grounds. First, it contended that Ragsdale had never been

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[4] Deposition of Tracy Ragsdale, pp. 53-56.

[5] Deposition of Tracy Ragsdale, p. 57.

eligible for any FMLA leave because when she first requested leave she had not yet worked for Wolverine the requisite twelve months. See 29 U.S.C. § 2611(2)(A)(i). Second, the company argued that the designation and notice requirements of the regulations on which Ragsdale had relied were invalid.

The district court held that Ragsdale had become qualified for FMLA leave in March, 1996, on the first anniversary of the date when she had been initially hired. (J.App. 87). The court concluded, however, that the regulations on which petitioners had relied were invalid. (J.App. 92). On appeal the Eighth Circuit held that the regulations were invalid as applied in the instant case; it reasoned, however, that the regulations would be valid in a case in which the employee could show that he or she had some need for the notice which the regulations require.

SUMMARY OF ARGUMENT

I. The Family and Medical Leave Act provides workers with a bundle of rights. Those various rights safeguard, elaborate on and enhance the statutory entitlement of 12 weeks of unpaid leave each year for a serious health condition or for certain other specified purposes. The informed exercise of those rights is often essential if a worker is to obtain the full benefit of, or perhaps any benefit at all from, the FMLA.

Information is often the sine qua non of leave under the FMLA. Unlike the federal minimum wage laws, the benefit of which is usually included directly in a worker's

paycheck, the FMLA is a complex set of employee prerogatives, options and entitlements. In the frequently occurring situation involving the interrelationship of FMLA leave and employer-provided leave, an employee must utilize those FMLA rights with particular care.

In the instant case, petitioner Ragsdale, unaware as she was of those rights, derived no benefit at all from the statute. Had Ragsdale known of and effectively used the employee prerogatives provided by the Act, her FMLA and employer-provided leave would have run consecutively, and she would have remained on leave until she was healthy enough to return to work.

II. Where an employee on employer-provided leave is also entitled to FMLA leave, the regulations at issue in this case do not permit an employer to count that leave against the employee's 12-week FMLA entitlement unless the employer has so notified the worker. Absent such notification, a worker is unlikely to realize that he or she is entitled to the benefits of the FMLA, and may well forfeit many or all of the worker's rights under the Act.

The court of appeals correctly recognized that there are situations under the FMLA in which an employee's lack of information so interferes with his or her exercise of FMLA rights that the employee cannot fairly be said to have been accorded FMLA leave. It concluded that the regulations would be valid in such instances. That court erred, however, in insisting that the FMLA mandates case-specific determinations of the impact of a lack of information. The text of the statute does not require such a cumbersome approach.

The Secretary of Labor legitimately chose instead to adopt a "bright line rule", treating as essential notice that an employee is entitled to FMLA leave, and refusing to count employer-provided leave as FMLA leave unless that notice has been provided. That represented a reasonable construction of the FMLA, and was consistent with this Court's practice of adopting bright line rules in construing both the Constitution and statutes.

III. The regulations in this case also operate to provide a straightforward rule for determining whether FMLA and employer-provided leave will run concurrently or consecutively. An employer can assure the leaves will run concurrently simply by providing to the employee the designation and notice specified by the regulations. Where the employer fails to do so, however, the regulations establish as the default rule that the leaves will run consecutively.

The court below objected that the default rule could penalize unwary employers. But some default rule is necessary in this situation. The text of the statute reflects no clear congressional intent as to which default rule should be used, and the Seretary's choice was a reasonable one.

ARGUMENT

I. INTRODUCTION

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, provides that

> an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . .
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1)(D) (App. 1). The Act confers the same right on any eligible employee who wishes to take leave in order to care for a newborn or newly adopted child, or for a close relative with a serious health problem. 29 U.S.C. § 2612(a)(1)(A)-(C) (App. 1).

The FMLA expressly preserves and encourages more generous leave policies, both those voluntarily adopted by employers and those mandated by state law. 29 U.S.C. §§ 2651-53. Conversely, the law provides that "[t]he rights established for employees under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." 29 U.S.C. § 2652.

The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. § 2654. Pursuant to that authority, the Secretary has promulgated detailed regulations concerning information which employers must provide to employees, and vice versa. Section 825.208(a) of the regulations provides that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA qualifying, and to give notice of the designation to the employee." 29 C.F.R. § 825.208(a) (App. 2). The notice to the employee must explain that leave designated as FMLA leave "will be

counted against the employee's annual FMLA leave entitlement." 29 C.F.R. § 825.301(b)(1)(i).

The form of notice is flexible. Notice can be provided orally or in writing. 29 C.F.R. § 825.208(b)(2) (App. 5). If the notice is oral, it must be confirmed in writing shortly thereafter. "The written notice may be in any form, including a notation on the employee's pay stub." *Id.* In general, an employer cannot designate leave as FMLA qualifying leave after the leave has already been taken. Retroactive designation and notice are permissible, however, where the employer reasonably was unaware until a later time that the employee was entitled to FMLA leave. 29 C.F.R. § 825.208(b)(1) (App. 4).

A related regulation provides that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).

II. THE REGULATIONS AT ISSUE MUST BE UPHELD UNDER *CHEVRON* UNLESS THEY EITHER ARE CONTRARY TO THE CLEARLY EXPRESSED INTENT OF CONGRESS OR ARE OTHERWISE AN UNREASONABLE INTERPRETATION OF THE FMLA

A challenge to the validity of administrative regulations is governed by *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the

> question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (footnotes omitted). In the absence of such clear congressional intent, an agency's interpretation will be upheld so long as it is "a reasonable one." 467 U.S. at 845.

Deference to the interpretation of the FMLA embodied in the regulations in this case is for several reasons particularly appropriate. Regulations promulgated contemporaneously with the statute they interpret are accorded special weight. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n. 17 (1981). In this case, the interim regulations were promulgated on June 4, 1993, four months after the February 5, 1993 enactment of the FMLA. (58 Fed. Reg. 31821, 31832 (1993)). The rule making process was unusually thorough, drawing hundreds of detailed comments from members of Congress and employer and employee organizations prior to the issuance of the interim rules and again prior to the promulgation of the final regulations. (60 Fed. Reg. 2180 (1995)). The final version of section 825.208(b) contained a

number of significant changes, adopted at the behest of several employers and employer organizations, to facilitate the designation process. (60 Fed. Reg. 2207-08 (1995)). On the other hand, no objections appear to have been raised to the provision in the interim and final version of section 825.700(a) that employer-provided leave which the employer has not designated as FMLA leave cannot count against an employee's 12-week FMLA entitlement. (60 Fed. Reg. 2229-30 (1995)).

III. THE REGULATIONS REASONABLY INTERPRET THE FMLA TO PROVIDE THAT AN EMPLOYEE HAS NOT RECEIVED THE LEAVE REQUIRED BY THE STATUTE IF HE OR SHE HAS NOT BEEN PROVIDED BY THE EMPLOYER WITH INFORMATION ESSENTIAL FOR A FULL AND EFFECTIVE UTILIZATION OF THE SUBSTANTIVE RIGHTS ESTABLISHED BY THE STATUTE

A. The Leave To Which An Employee Is Entitled Under The FMLA Encompasses A Bundle of Rights

The decision of the court of appeals rests on a single, repeatedly stated and fatally flawed premise – that the sole right guaranteed by the FMLA is that 12 weeks during which a worker was qualified for FMLA leave must coincide with weeks during which he or she was in fact on leave. "The terms of the statute contemplate *only* that the employer will be required to provide a 'total' of twelve weeks of unpaid leave." (J.App. 110) (Emphasis added) (See 29 U.S.C. § 2612(a)(1) (App. 1), 29 U.S.C. § 2612(d)(1)).

In reality both the terms and the operations of the FMLA are far more complex. In addition to requiring that an employee be permitted to take twelve weeks of leave, the FMLA imposes affirmative obligations on employers during that period of leave, provides to employees important prerogatives which they can exercise during that leave, gives employees rights which enable them to conserve or augment the available leave period, and establishes requirements which an employer must meet when the employee returns to work. In some instances employees who under the FMLA are not eligible for reinstatement are nonetheless entitled to the rights, prerogatives and benefits of FMLA leave.[6]

The statute imposes on the employer during the term of the FMLA leave several significant affirmative obligations. The employer must maintain coverage under any "group health plan" (as defined in 26 U.S.C. § 5000(b)(1)). 29 U.S.C. § 2614(c)(1) (App. 2). The level and conditions of that medical coverage must be the same as would have existed if the employee were still working. *Id.* Thus, the amount of any premiums the worker pays cannot be increased because of the FMLA leave, and the worker must be afforded an opportunity to select any new types of coverage offered to current workers. 29 C.F.R. § 825.209. Because employers are required to keep records specified by the applicable regulations, 29 U.S.C. § 2616(b), and because regulations require certain records regarding workers on FMLA leave, 29 C.F.R. § 825.500(c),

[6] See 29 C.F.R. § 825.312(f).

the fact that a worker is on FMLA leave triggers additional record keeping obligations.[7]

In addition, the statute confers on employees several important prerogatives which they may exercise during the period of FMLA leave. First, an employee on FMLA leave is entitled to "substitute" accrued paid vacation leave, personnel leave, and (depending on the type of FMLA leave) family or sick leave for unpaid leave. 29 U.S.C. § 2612(b)(2). An employer's personnel rules might otherwise provide that a worker, although having such accrued paid leave, would under certain circumstances instead be limited to utilizing employer-provided unpaid leave.[8] By exercising his or her FMLA right to substitute

[7] In this case it is undisputed that Ragsdale in fact received six months of medical coverage during the employer-sponsored leave.

In support of its motion for summary judgment, the company asserted only that it had made premium payments for this coverage "as provided by its policy." Affidavit of Robert H. Smith, p. 2 ¶ 9. It is unclear whether this refers to the health insurance policy or the company's policy regarding workers on unpaid sick leave. This assertion clearly falls short of an allegation that Ragsdale herself paid only the same premiums she would have owed had she remained a full time employee.

Respondent has never contended with regard to Ragsdale's leave that it kept the records required in connection with an FMLA leave.

[8] Respondent's leave plan appears to operate in this manner. Most workers can only use their vacation leave during a fixed period in July and December of each year, which may not overlap with the employee's absence. Even if the absence does overlap with those periods, it is at best unclear if the employee could insert paid vacation leave in the middle of an unpaid sick leave.

paid leave, a worker can increase his or her income during the leave period, and may be able to extend the total leave period, since the worker would not be using unpaid employer leave during the days of the substituted paid leave.[9]

Second, under the FMLA an employee with the requisite serious health condition is entitled to take leave intermittently, such as by working fewer than the normal number of hours a day. 29 U.S.C. § 2612(b)(1) (App. 1). An employer-provided sick leave plan might not accord the worker this option. The exercise of this prerogative can benefit the worker in either or both of two distinct ways. An employee who elects to work on a reduced schedule will receive a portion of his or her usual paycheck, rather than remaining entirely on unpaid leave. In addition, an employee who works intermittently will be using up his or her FMLA leave at a slower pace, allowing the employee to remain on leave longer or to save part of that FMLA leave for some anticipated or unexpected future need.

Third, once an employee is on FMLA leave, the worker would be free to disregard any leave-eligibility standards established by an employer that were more demanding than those for FMLA leave.[10] 29 C.F.R.

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[9] This would occur if the employer-sponsored unpaid leave was for more than 12 weeks. By substituting paid leave during the period when the employee qualified for FMLA leave, the employee would during that time use less of his or her allotment of unpaid employer-sponsored leave.

[10] Respondent's leave has two such requirements. First, the employee must provide every 30 days a new certification from his or her health care provider. (J.App. 45). Under the FMLA an employer can only require a new certification if it has reason to believe that an earlier certification is no longer accurate. 29 C.F.R. § 825.305(c). Second, under respondent's plan, sick leave apparently is provided only if the employee is unable to work at all. (J.App. 45). Under the FMLA, on the other hand, a worker with a serious health condition need only show that he or she for that reason is unable to perform his own job. 29 U.S.C. § 2612(a)(1)(D).

§ 825.207(h). Thus if, for example, the employer's leave plan required certification by a company doctor, the worker could decline to submit to that additional physical examination except in the narrow circumstances in which the FMLA allows the employer to insist on a second medical opinion. 29 U.S.C. § 2613(c). This would avoid the inconvenience and invasion of privacy involved in having to be examined by a health care provider other than the employee's own.

Fourth, in some circumstances this difference in eligibility requirements under the FMLA and under the employer-provided leave plan would afford the worker another, even more important option. When a worker is on FMLA leave, the employer has a right to substitute paid leave, but not to substitute unpaid leave. 29 U.S.C. § 2612(d)(2) (App. 1). If an employee is initially awarded unpaid employer-provided leave with a heightened eligibility requirement, but the employer then notifies the worker that it has also designated the leave as FMLA leave, the employee will know that he or she can then opt to stop meeting that heightened requirement. Since the worker would no longer qualify for the employer-provided leave, the employee would *only* be utilizing FMLA

leave. At the end of the FMLA period, the worker could resume meeting the standard for, and thus once again receive, the employer-provided leave. In this manner, where the employer-provided leave both is unpaid and contains an eligibility standard higher than that for FMLA leave, the employee has the ability under the FMLA to use the FMLA and employer-provided leave consecutively rather than concurrently.

Finally, the structure of the FMLA provides employees with a variety of ways to conserve and even augment the amount of leave available for a given need. The statute allots to an employee not a single leave of up to 12 weeks, but "a total" of 12 weeks of leave a year. 29 U.S.C. § 2612(a)(1). Thus an employee can control the amount of leave he or she will have available later in a year by reducing the amount of leave utilized in earlier periods. That option is especially important for leave under subsections (A), (B), and (C) of section 2612, all of which involve care for other people. An employee, by arranging for some other form of care earlier in a year, can assure the continued availability of unused leave later in the year.

Second, the employee is entitled to a new 12 weeks of leave for each 12 month period. 29 U.S.C. § 2612(a)(1). If the employer opts to designate calendar years as the 12 month period it is using, or if the employer fails to make any designation at all, the employee could take 12 weeks of leave at the end of one year followed by 12 weeks of leave at the beginning of the next. See 29 C.F.R. § 825.200. Thus the employee can control the total amount of continuous FMLA leave he or she has by timing the commencement of that leave towards the end of a calendar year.

This is likely to be a particularly valuable option for an employee who has the ability to determine when he or she will utilize FMLA leave, such as by choosing when to begin care for an ailing parent or when to have non-emergency surgery.

Two other FMLA rules are also relevant to how an employee utilizes FMLA leave. Employers can generally designate either paid or unpaid employer-provided leave as also being FMLA leave, causing the FMLA leave to run concurrently; thus if a worker requests two weeks of vacation to take care of a new baby, the employer can designate that leave as also being FMLA leave. But an employer cannot do this if the worker has taken compensatory leave under the Fair Labor Standard Act. 29 C.F.R. § 825.207(i). Thus it may be important which form of non-FMLA leave a worker chooses to use. In addition, periods of more than a week when the employer's business activity has generally ceased, such as a combined Christmas/New Year break, cannot count towards the 12 week FMLA total. 29 C.F.R. § 825.200(f). Thus a worker who schedules his or her leave to include such a period will be able to remain on leave for an additional calendar week or more.

Finally, when the employee returns from leave, the worker must be restored to the position he or she held prior to the leave, or to an equivalent position. 29 U.S.C. § 2614(a). The employee must also be afforded any across-the-board raises that were given to other employees during that period of leave. 29 C.F.R. § 825.215(c).

B. Information Is Essential To The Utilization of FMLA Rights

Information is the sine qua non of FMLA leave. The FMLA in this regard is very different from the minimum wage provisions of the Fair Labor Standards Act. For most workers the benefit of the minimum wage laws is included in the paycheck they receive. So long as the employer has obeyed the law, a worker can enjoy the full benefits of his or her FLSA rights simply by cashing that paycheck and spending or saving the proceeds in whatever way he or she pleases. The employee can (and often may) obtain the full benefits of the minimum wage law without ever understanding the details of that law and its implementing regulations, or even knowing of their existence.

But the FMLA is not a simple cash payment; it is a complex interrelated set of employee rights, prerogatives, and options. The benefit (if any) which an employee derives from the FMLA can depend largely on an understanding of the rights he or she has under that system, an understanding which usually must begin with a realization that the worker is entitled to FMLA leave. It is exceedingly unlikely that a worker unaware that he or she qualifies for FMLA leave will ever invoke any of the prerogatives provided by the law, or use any of the methods available to conserve or maximize FMLA leave. An employee who does not realize when and how FMLA leave can be used will be incapable of planning work, leave, care and/or medical treatment in a manner that obtains maximum (or in some cases any) benefit from the FMLA.

Because an employer's own vacation and other leave rules constantly have a considerable impact on the schedule and lives of its employees, those workers can be expected to familiarize themselves with and rely on those practices. But until an employee has been alerted to the fact that he or she is entitled to FMLA leave, the worker will have little reason to try to understand the often quite different and frequently more favorable parallel set of rules that exist under the FMLA.

The situation in which this problem most often arises creates a particularly great need for express notice about the FMLA. Frequently, as occurred in this case, that need arises where an employee simply asks for leave, and is told by the employer that he or she can take some form of employer-provided leave. Many employees do not even know of the existence of the FMLA. Those who do would be unlikely to realize from a request and response referring only to employer-provided leave that they are also entitled to the benefits, prerogatives and rights of FMLA leave. Workers who need to go on leave generally rely on their employers for a candid explanation of their rights and options; whatever an employer's motives may be, if an employer's explanation omits any reference to the fact that the worker is entitled to FMLA leave, the worker will fairly but mistakenly assume that the explanation which he or she has received is a complete statement of his or her rights.

In the instant case Ms. Ragsdale, although qualified for FMLA leave, derived no benefit whatsoever from the statute. An informed exercise of the rights provided by the FMLA would clearly have been to her advantage. If Wolverine had notified Ragsdale that it was designating

her leave as FMLA leave, Ragsdale would have been prompted to inquire about the significance of that designation. Once Ragsdale qualified for FMLA leave, Wolverine was obligated to provide Ragsdale with additional written information about her rights under the statute, 29 C.F.R. § 825.301(c); the company never did so.[11] Wolverine would also have been required to provide whatever additional information Ragsdale might have requested. 29 C.F.R. § 825.301(d).

Armed with the resulting information, Ragsdale would have been able to invoke her FMLA rights in a variety of ways. She could have chosen to temporarily stop qualifying for the company's unpaid sick leave,[12] instead using up her FMLA leave, and then have resumed use of the company-provided leave when the FMLA leave had ended. By proceeding in that manner, Ragsdale would have utilized the two leaves consecutively rather than concurrently, and have had enough combined leave to last until she was able to return to work in late 1996. By invoking her right under section 2612(b)(1) to use FMLA medical leave intermittently, Ragsdale could have extended beyond 12 calendar weeks the total time she was on FMLA leave. If this extended the period of FMLA leave until the company's annual two week July closing, that would in effect have added yet another two calendar weeks to her FMLA leave. 29 C.F.R. § 825.200(f). And,

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[11] Designation might itself have alerted Wolverine officials to their obligation to provide that information.

[12] Ragsdale could have done so by not filing requests for 30 day sick leave renewals, or by not providing the monthly medical certification required by the company.

once she passed the first anniversary of the date on which she was originally hired, Ragsdale could have asserted her right under section 2612(d)(2)(B) (App. 1) to substitute her week of vacation pay for a week of the FMLA leave.

Because Wolverine never gave Ragsdale the designation and notice contemplated by the regulations, however, none of this ever came to pass.

C. The Designation Required By The Regulations Is Essential For The Full and Effective Utilization of FMLA Rights

The regulations at issue in this case reflect a determination by the Secretary that where an employee entitled to FMLA leave is placed on company-provided leave without being told of that entitlement, that omission is so likely to impair the effective exercise of FMLA leave rights that the employer cannot be said to have accorded to the employee the leave to which he or she is entitled under section 2612.

The withholding of information essential to the exercise of much of the bundle of FMLA rights is the practical equivalent of a denial of those rights themselves. This Court has long recognized that principle with regard to rights established by the Fifth and Sixth Amendments. A suspect during a custodial interrogation cannot ordinarily exercise or knowingly waive his or her rights to counsel and against self-incrimination without being told of those constitutional protections. *Miranda v. Arizona*, 384 U.S. 436 (1966). A state could not meet its obligations under *Gideon v. Wainwright*, 372 U.S. 335 (1963), to provide trial

counsel to indigent criminal defendants if it hired lawyers for that purpose, and had one at the ready in every courtroom, but neglected to mention the availability of counsel to pro se indigent defendants. Defendants who have not been expressly told of their rights to a trial, to a jury, to confrontation of witnesses and to compulsory process cannot waive those rights simply by pleading guilty. *Boykin v. Alabama*, 395 U.S. 238 (1969).

Although Congress provided that an employee entitled to FMLA leave should be afforded an array of rights, the statute does not specify the point at which so many of those rights have been withheld or interfered with that what remains is insufficient to constitute FMLA leave at all. A denial of some FMLA rights, although less than a denial of all, could undoubtedly be so serious that what remained would no longer count towards meeting an employer's obligation to provide 12 weeks of leave "under section 2612." Some defects are sufficiently harmful that they alter the nature of the subject. A stallion whose mane has been cut off is merely a less attractive stallion, but a gelding is not a stallion at all.

If an employee asked for 12 weeks of leave, but the employer granted only half that number, the denial of the other 6 weeks of leave would violate the FMLA, but the 6 weeks that were granted would (at least absent unusual circumstances) count as FMLA leave and reduce the worker's allotment accordingly. But if an employee asked for 12 weeks of leave, and was told that he or she had to work for 4 hours a day throughout the period, what the worker received would not count as FMLA leave at all, even though the total hours of leave accorded would be the same as in the first example.

The regulations reflect a determination by the Secretary that denial of notice to an employee receiving employer-provided leave that he or she qualifies for FMLA leave so seriously impairs the bundle of FMLA rights that that leave cannot "count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a). The Secretary has acted with restraint in drawing the distinction between what constitutes merely defective FMLA leave, sufficient to exhaust the employer's twelve week obligation even though constituting a violation of the law, and a partial set of benefits so deficient that they do not constitute FMLA leave at all. Under the regulations, twelve weeks of otherwise sufficient leave which omit medical benefits is FMLA leave nonetheless; the employee cannot obtain more leave during the 12 month period, although he or she can sue for the monetary loss caused by that omission. Only where an employer has failed by designation to notify an employee of his or her FMLA entitlement do the regulations conclude that under the statute the leave simply cannot count as FMLA leave at all. This is precisely the sort of judgment that Congress authorized the Secretary to make by regulation.

The distinction drawn by the regulations is a sensible one. Where an employer has denied a specific identifiable right, or even several, it will often be practicable after the fact for a court or jury to assess what monetary loss resulted. But where an employer fails even to advise an employee that he or she has qualified for FMLA leave, determining the consequences of that omission will often be impossibly complex. A trier of fact would be forced to reconstruct an elaborate series of consequences, attempting to recreate how the employee and employer would

have acted and interacted over what might be a period of months, an exercise in conjecture whose outcome and accuracy would be unknowable. The regulations were adopted for the express purpose of avoiding "protracted 'after the fact' disputes." (60 Fed. Reg. 2207 (1995)). The Secretary permissibly concluded that an employer who failed to provide that critical information should not be deemed to have provided FMLA leave at all.

D. The Secretary Reasonably Adopted A Bright Line Rule Regarding What Information An Employer Must Provide If Employer-Provided Leave Is To Count As FMLA Leave

The Eighth Circuit did not hold that the FMLA notice and designation regulations are always invalid. To the contrary, it insisted that the regulations would be valid in any case in which the specific worker involved actually needed the information to exercise his or her rights under the FMLA. (J.App. 114). The court of appeals summarily applied that holding to the instant case, asserting without explanation that Ragsdale could not have put that information to any use. (J.App. 115).

This disposition was entirely inappropriate in the procedural posture of this case. Wolverine's motion for summary judgment was based solely on its contention that the FMLA regulations are invalid in all applications, a contention accepted by the district court although not by the court of appeals. Under the applicable local rules Wolverine was required to submit a statement of the facts

which it asserted were undisputed.[13] Wolverine's statement of undisputed facts did not include an assertion that Ragsdale had no need for the omitted designation and notice.[14] Petitioners were never afforded any opportunity to demonstrate that Ragsdale would indeed have benefitted from the missing information, or even provided an opportunity to respond to an appropriately framed contention to the contrary.

More fundamentally, the court of appeals erred in assuming that the FMLA could only be construed in a manner requiring individualized case-by-case determinations as to whether each employee needed a particular item of information. On that view, a regulation would be valid in its entirety only if it stated that notice of designation was to be given "to any employee who needs it" or if it enumerated all the situations in which that notice would be useful to employees. A regulation phrased in general terms would provide employers no meaningful guidance as to when designation and notice are and are not required. A regulation listing all the situations in which notice of designation would be valuable to employees, although long and complex, would be no more helpful to employers, which would rarely know enough about the personal circumstances of each worker to be able to discern which worker would benefit from what information. Under a statute such as the FMLA one of the central purposes of a regulation is to provide clear notice to the affected parties of their respective rights and

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[13] Local Rule 56.1, E.D.Ark.

[14] Defendant's Statement of Additional Undisputed Facts.

obligations. The sort of regulation suggested by the court of appeals would fall far short of that goal.

The Eighth Circuit conspicuously failed to appreciate the wide range of circumstances in which employees could put to good use an understanding that they were entitled to the full protections of FMLA leave. Its analysis is devoid of any reference to the prerogatives accorded to employees during a period of FMLA leave, and reflects little understanding of the complex ways in which employees can conserve, or augment the number of, available FMLA leave days. The Secretary, rather than attempting to fashion a complex, fact-dependent notification requirement, properly adopted a single bright line rule.

This Court has repeatedly and quite self-consciously created bright line rules in interpreting the constitution,[15] statutes,[16] treaties,[17] and rules.[18] It has also approved the decision of administrative agencies to create such clear rules.[19] The bright line created by the regulations in this case provides employers with a clear statement of the

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[15] *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Michigan v. Jackson*, 475 U.S. 625 (1986); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

[16] *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 779 (1989); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988); *Basic, Inc. v. Levinson*, 485 U.S. 224, 233 (1988).

[17] *Chan v. Korean Air Lines*, 490 U.S. 122 (1988).

[18] *Houston v. Lack*, 487 U.S. 266, 275 (1988).

[19] *Auriello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 788 (1996).

simple steps they must take if they want to assure that the leave they are providing is sufficient to count as FMLA leave. The Secretary was under no obligation to adopt the vaguely phrased standard proposed by the court of appeals which, although more favorable to some employers who fail to provide designation and notice, would leave most employers uncertain as to the scope of their obligations, and many employees unaware of their rights.

IV. THE REGULATIONS PROVIDE A REASONABLE INTERPRETATION OF WHEN UNDER THE STATUTE FMLA LEAVE AND EMPLOYER-PROVIDED LEAVE DO AND DO NOT RUN CONCURRENTLY

The coexistence of FMLA leave and various types of employer-sponsored leave poses a question that has long arisen in personnel administration. Many employers afford their workers several different types of leave, paid and/or unpaid. Each form of leave has its own criterion of eligibility, some broad (e.g., vacation or personal leave) and some quite narrow (funeral leave). See 5 C.F.R. pt. 630. It inevitably occurs that circumstances arise in which an employee is eligible for several different types of leave. A worker hospitalized for appendicitis, for example, would typically qualify to use both sick leave and vacation leave.

Any system with multiple, potentially overlapping types of leave requires a rule for resolving two issues: (1) whether the employee or the employer selects which type of leave is used, and (2) whether a day of absence qualifying for two types of leave must be deducted from both or

only from one. Under most employer plans such an absence will utilize only one type of leave; the periods for vacation leave and sick leave, for example, ordinarily can be used consecutively. A similar problem arises if a longer period of leave encompasses a holiday, such as Thanksgiving, that is accorded to all or most workers; that holiday may or may not be included in the determination of how many days of leave were used. In these circumstances the employer's own policy (possibly constrained by a collective bargaining agreement) will determine whether the overlapping types of leave will run concurrently.

A more complex situation arises where, as here, the two (or more) types of overlapping leave arise from different sources, one an employer-provided leave plan, the other the requirements of federal (or state) law. In such a case a determination must be made as to whether the choice between concurrent and consecutive use of the two overlapping types of leave will be dictated by federal law or be resolved according to the wishes of the employer or of the employee. The very creation by the FMLA of federally mandated leave requires the existence of a rule regarding how the choice between consecutive and concurrent utilization will be made.

That question is in some but not all situations addressed and resolved by the express terms of the FMLA. First, if the employee requests leave, and the employer offers only unpaid FMLA leave, the employee in turn can insist that the employer "substitute" certain types of paid leave. 29 U.S.C. § 2612(d)(2). Substitution means that the employee will be consuming concurrently his or her entitlement to FMLA leave and the employer-

provided paid leave, but the employee will benefit from the income under the paid employer-sponsored leave.

Second, if the employee asks only for FMLA leave, preferring to avoid using up his or her employer-provided paid leave, the employer in turn can insist that the employee substitute certain types of paid leave. That insistence will cost the employer money, but will mean that the leaves run concurrently. Because the employer must act through the employee, "requir[ing] the employee to substitute" the employer-provided leave, the employee is necessarily alerted to the fact that both types of leave are being consumed. Section 2612(d)(2) limits the types of paid leave which one party or the other can, by demanding substitution, cause to be used concurrently with the FMLA leave.[20] If, however, the employer offers or the employee requests only FMLA leave, and no request for substitution is made, the FMLA leave and employer-provided paid leave (assuming the worker is absent long enough to later need to invoke the employer-provided leave) will run consecutively.

The statute, however, is silent with regard to two other situations – (1) an employee entitled to FMLA leave simply requests leave, without mentioning the FMLA,

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[20] For FMLA leave under subsections (A) and (B), substitution can be required of paid vacation, personal, or family leave. For FMLA leave under subsection (C), substitution can be required of paid vacation, personal, family or sick leave. For FMLA leave under subsection (D), substitution can be required of paid vacation, personal, or sick leave.

Substitution cannot be required of other types of paid leave, such as paid disability leave.

and the employer in providing leave explains only that it is some form of employer-provided leave, and (2) (less commonly, but the case here) an employee initially ineligible for FMLA leave, and thus awarded some form of employer-provided leave, later becomes eligible for, but does not (at least for a period of time) request by name, FMLA leave. The substitution provision of section 2612(d) does not apply, since the employee in both situations is already receiving employer-provided leave. No provision of the statute itself establishes a rule for determining in these cases whether FMLA leave will be deemed to run concurrently with the employer-provided leave. The administration of the FMLA, however, clearly requires the existence of some such rule, because without it there would be no way to know at the end of the employer-provided leave period whether an employee was still entitled to FMLA leave (because the leaves run consecutively) or was not (because the leaves had run concurrently).

This question obviously is not one to which "Congress has spoken directly." *Chevron*, 467 U.S. at 842. To the contrary, the complete absence of any statutory provision for determining whether (and if so when) FMLA and employer-provided leave shall run concurrently or consecutively in these two situations is undeniably "a gap for the agency to fill." 467 U.S. at 843.

The regulations fill this gap by establishing a standard and procedure that are analogous to the approach taken by section 2612(d). As under section 2612(d), the employer is accorded the option of insisting that FMLA and employer-provided leave run concurrently. In the absence of employer designation under the regulations,

as in the absence of employer (or employee) substitution under section 2612(d), the two types of leave will run consecutively. Consecutive utilization of the two forms of leave is the default rule if designation and notice do not occur. The notice requirement included in the regulations, like the section 2612(d) requirement that the employer act through the employee, assures that the employee will understand that the two types of leave are running concurrently.

Neither the employer nor the court of appeals objected to the fact that the regulations permit concurrent utilization of FMLA and employer-sponsored leave, or to the fact that the employer is allowed to decide whether that will occur. They challenge only the default rule. But the existence of *some* default rule is a necessary part of a legal regime in which the employer has (but may fail to exercise) the right to decide whether or not the employer-sponsored leave counts as and thus runs concurrently with FMLA leave. Of course, the Secretary could have chosen the opposite default rule – deeming employer-provided leave also to be FMLA leave unless the employer designated otherwise. But the text of the statute itself obviously does not require that one default rule or the other be selected.

The Secretary's decision to adopt the default rule in question was assuredly reasonable. That default rule provides the employer with an incentive to resolve the matter quickly, thus enabling the worker to exercise his or her FMLA rights in an effective and informed manner. Thus, employer *in*action is not permitted to interfere with or deny the exercise of FMLA rights. See 29 U.S.C. § 2615(a)(1) (App. 2). If a federal employee asks for and

recieves annual leave, sick leave, or some other type of agency-provided leave, it is the policy of the federal government *not* also to deduct that period of leave from the worker's 12 week FMLA entitlement, unless the worker expressly asks that the two types of leave run concurrently.[21] The default rule at issue in this case, in the absence of any notice to the contrary to the affected employee, deems the employer's policy to be the same as that of the national government.

The court of appeals objected that the default rule could operate to the disadvantage of an "unwary" employer if the employer, which would have preferred that the FMLA and employer-provided leave run concurrently, neglected to exercise its right to designate the leave as FMLA leave. (J.App. 112). The opposite default rule, however, although preferred by the employer in this case, would in turn impose a more serious burden on many employees. If mere inaction on the part of an employer had the effect of making FMLA leave run concurrently with the employer-provided leave, an employee who was told only that he or she was receiving employer-provided leave would ordinarily have no reason to conclude or suspect that he or she was also utilizing his or her FMLA leave. The Secretary reasonably concluded that the employer, not the employees, should run the risks of unwariness. Employers are in a far better position than

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[21] 5 C.F.R. § 630.1203(h) ("An agency may not put an employee on family and medical leave and may not subtract leave from an employee's entitlement to leave . . . unless the agency has obtained confirmation from the employee of his or her intent to invoke entitlement to leave [under the FMLA].")

workers to familiarize themselves with the provisions of, and their obligations under, the statute and regulations. The FMLA applies only to employers with at least 50 employees. Companies of that size will already have personnel officials, or accounting or other outside firms, that deal with the myriad of federal and state laws regarding the employment relationship; most will have either in-house counsel or attorneys on retainer. Countless government and private publications alert personnel officials to their responsibilities under the FMLA. The FMLA regulations include a model leave-application form which expressly alerts company officials to the need to make a designation decision. 29 C.F.R. pt. 825, App. D. If in those circumstances an employer fails to make the designation it would have wanted, that is not because the firm has been unfairly blindsided, but because its human resources department, outside consultants or lawyers simply did not do their jobs. An ordinary worker, on the other hand, has neither the staff, the resources nor the expertise necessary to learn of the existence of a default rule favorable to the employer, or thus to understand that an employer's mere silence means that the worker is utilizing his or her FMLA leave concurrently with his employer-provided leave.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

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APPENDIX OF STATUTES AND REGULATIONS

29 U.S.C. § 2612(a)(1)

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 work-weeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(b)(1)

[L]eave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary.

29 U.S.C. § 2612(d)(2)(B)

An eligible employee may elect, or an employer may require, the employee to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of

the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

29 U.S.C. § 2614(c)(1)

[D]uring any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions the coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

29 U.S.C. § 2615(a)(1)

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

29 U.S.C. § 2654

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

29 C.F.R. § 825.208

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such

notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice,

though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave – consistent with the employer's established policy or practice – and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between

the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate

leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absences preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

29 C.F.R. § 825.301(b)(1)

The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. . . . Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208) . . .

29 C.F.R. § 825.700(a)

. . . If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

Supreme Court, U.S.
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No. 00-6029

In The

Supreme Court of the United States

TRACY RAGSDALE, et al.,

Petitioners,

vs.

WOLVERINE WORLD WIDE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

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QUESTION PRESENTED

The Family and Medical Leave Act of 1993 (FMLA or Act) requires covered employers to provide eligible employees with "a total of 12 workweeks of leave during any 12-month period" for specified reasons, 29 U.S.C. § 2612(a)(1), including leave needed "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee," 29 U.S.C. § 2612(a)(1)(D). The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. § 2654. The question presented is as follows:

Whether the Secretary has acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the Act's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave.

CORPORATE DISCLOSURE STATEMENT

Respondent Wolverine World Wide, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29(6).

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STATEMENT OF THE CASE

A. This case arose out of a dispute between an employee and her employer over the employee's leave rights under the Family and Medical Leave Act (the "FMLA"), 29 U.S.C. § 2601, *et seq.* The employee, Tracy Ragsdale ("Petitioner" or "Ragsdale"), claims that her employer Wolverine World Wide, Inc. ("Respondent" or "Wolverine"), violated the FMLA when it refused to grant Ragsdale additional medical leave under the FMLA after she had exhausted her company provided 30 weeks (seven months) of medical leave.

Petitioner Tracy Ragsdale began her employment with Wolverine on March 17, 1995. On February 21, 1996, before she had completed twelve months of service with Wolverine, Ragsdale requested leave after her diagnosis of cancer. Wolverine granted her request, and Ragsdale's leave commenced on that date. Wolverine's leave policy allowed employees with six months of service to take unpaid leave for up to seven months (30 weeks). The leave policy required employees on leave to submit requests for extensions of leave every thirty days. Consistent with that requirement, Ragsdale requested an extension of her leave on March 18, April 22, May 21, June 20, July 22, and August 15 of 1996. Each request for extension was granted by Wolverine. During the time she was on leave, Wolverine maintained Ragsdale's health insurance benefits, and even exceeded the requirements of the FMLA by paying Ragsdale's portion of her insurance premiums for six months. Wolverine also held Ragsdale's position open for her during the entire 30 weeks of unpaid leave. (Joint App. 83-84).

Ragsdale was terminated on September 20, 1996, because she had exhausted her 30 weeks of company provided leave in full and was unable to return to work. Wolverine never advised Ragsdale that it was designating any of the 30 weeks leave as FMLA leave.[1] On September 26, 1996, Ragsdale returned to Wolverine and requested an additional twelve (12) weeks of FMLA leave. She was informed that she had requested and used all of her available leave and, therefore, Wolverine declined her request. Ragsdale's physician released her to work in December 1996 and she was able to resume full work duties for another employer on December 31, 1996. (Joint App. 83-84).

B. Upon cross motions for summary judgment, the United States District Court for the Eastern District of Arkansas granted Wolverine's motion for summary judgment and dismissed Petitioner's claim that she was entitled, pursuant to the FMLA, to an additional 12 weeks of leave specifically designated as FMLA leave after having exhausted her 30 weeks of company provided medical leave. Subsequent to the Petitioner's motion to alter or amend, the District Court issued a second Order wherein it adopted the Eleventh Circuit's holding in *McGregor v. AutoZone, Inc.*, 180 F.3d 1305 (11th Cir. 1999) (affirming the district court's decision in *Cox v. AutoZone, Inc.*), which found that the DOL's employer notice regulations,

[1] Wolverine never designated any of the leave as FMLA leave because it determined, erroneously, according to the District Court, that she was not an eligible employee since at the time she commenced her leave Ragsdale had not been employed by Defendant for twelve (12) months.

requiring employers to notify an employee that an absence is being counted as FMLA leave before the employer can count the leave against the employee's twelve-week entitlement under the FMLA, invalid because it converts the FMLA's minimum of federally mandated unpaid leave into an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using FMLA leave.

The Eighth Circuit Court of Appeals affirmed the District Court's decision holding the DOL regulation at 29 C.F.R. § 825.700(a)[2] invalid insofar as it purports to require an employer to provide more than twelve weeks of leave. The Court of Appeals found that such a regulation is not a permissible interpretation of the FMLA and is not consistent with the purpose and intent of the FMLA.

SUMMARY OF ARGUMENT

I. Petitioner Tracy Ragsdale took 30 weeks of unpaid leave under Wolverine's sick leave policy. During Petitioner's 30-week leave, Wolverine maintained her

[2] Wolverine had requested that the Eighth Circuit find the DOL's employer notice regulations at 29 C.F.R. §§ 825.208(c) and 825.700(a) invalid since both employer notice regulations are basically the same, except that 29 C.F.R. § 825.208(c) covers paid leave and 29 C.F.R. § 825.700(a) covers paid and unpaid leave. The Court only ruled that 29 C.F.R. § 825.700(a) was invalid without comment on whether 29 C.F.R. § 825.208(c) was invalid, presumably because the employer provided leave at issue here is unpaid.

health insurance benefits and paid her insurance premiums for 26 weeks. Finally, Wolverine kept Petitioner's job open for her for the duration of the 30-week leave period. On September 20, 1996 after the expiration of the 30 weeks, Petitioner was terminated pursuant to Wolverine's sick leave policy, since she was unable to return to work due to her medical condition. Now, after having permitted herself to receive 30 weeks of company provided medical leave, Petitioner contends that she is entitled to an additional 12 weeks of leave, because Wolverine failed to formally and specifically designate her 30-week leave as FMLA leave. To impose such a result on Wolverine would distort the FMLA beyond anything envisioned by Congress.

A. The primary purpose behind the FMLA is to provide eligible employees with a total of 12 workweeks leave for covered family and medical needs. The FMLA reflects a balancing between employees' need to take reasonable leave for medical reasons and the legitimate interests of employers. The total of 12 workweeks leave also represents a carefully crafted compromise by Congress as to the total amount of leave available to employees. To the extent the regulations at issue require an employer to provide more than 12 workweeks of leave within a 12 month period, such regulations conflict with the expressed intent and purpose of the FMLA.

B. Contrary to the expressed provisions of the FMLA, the DOL's employer notice regulations discourage employers from adopting or retaining leave policies more generous than the requirements of the Act. Employers are discouraged from adopting or retaining leave policies more generous than the Act out of concern that they will

be required to provide an additional 12 workweeks of leave, over and above the employer's leave policy, unless the employer specifically and prospectively designates the leave as "FMLA leave." The plain text of the statute and the legislative debate both plainly reveal that the FMLA leave provisions were not intended to burden employers providing leave more generous than that contained in the FMLA.

II. The DOL's employer notice regulations are not entitled to deference since they are contrary to the unambiguously expressed intent of Congress that leave under the FMLA be limited to a total of 12 workweeks. Any view of the FMLA, other than that the twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires, will upset the carefully crafted compromise reached by Congress when it passed the FMLA. Therefore, the regulations are invalid under step one of the *Chevron* test. Moreover, the regulations are invalid under step two of the *Chevron* test, since they are an impermissible construction of the Statute and are "arbitrary, capricious, and manifestly contrary to the statute." To the extent that the DOL employer notice regulations seek to fill a perceived gap in the Statute they are broader than necessary to achieve their purpose, and are punitive to those employers who have provided at least 12 workweeks of leave.

A. Where the intent of Congress is unambiguous, the Agency interpretation of the statute is not entitled to deference. Here the intent of Congress is unambiguous; eligible employees are entitled to federally protected leave for a total of 12 workweeks. The DOL's employer

notice regulations that require more than 12 workweeks of leave are invalid and not entitled to deference.

B. Even if the statute is somewhat ambiguous and left a gap for the DOL regulations to fill, the DOL's employer notice regulations are an impermissible construction of the statute as they are arbitrary, capricious and manifestly contrary to the statute. Following the DOL's employer notice regulations would render nugatory the statute's limitation to a total of 12 workweeks of leave.

C. Where Congress wanted explicit notice provisions, it provided for them in the statute. The DOL's employer notice regulations are not supported by the notice regulations of the statute and change the balance Congress explicitly struck between employers and employees. Further, where Congress felt a penalty was warranted for non-compliance, it provided for a monetary penalty. The DOL's penalty for non-compliance with its employer notice regulations is grossly excessive and directly contrary to the Statute's primary purpose to limit leave to a total of 12 workweeks.

III. The DOL appears to have exceeded the general rulemaking authority granted it by the statute in its promulgation of the prophylactic employer notice regulations.

IV. Even assuming the DOL's employer notice regulations are valid, Wolverine's failure to designate any of the Petitioner's 30-week company provided leave specifically as FMLA leave, did not otherwise interfere with or restrain her exercise of her FMLA rights since she received all the benefits provided for in the FMLA and

since she was unable to return to her position at the conclusion of her leave period, and in fact was not able to return to full duty until more than 10 months after she commenced her leave.

ARGUMENT

I. THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS AT ISSUE ARE AN IMPERMISSIBLE INTERPRETATION OF THE FMLA SINCE THE PURPOSE AND INTENT OF THE FMLA IS TO PROVIDE ELIGIBLE EMPLOYEES WITH A TOTAL OF 12 WEEKS OF LEAVE FOR COVERED FAMILY AND MEDICAL NEEDS, AND THE EMPLOYER NOTICE REGULATIONS CONFLICT WITH THAT PURPOSE TO THE EXTENT THAT THEY WOULD REQUIRE AN EMPLOYER TO PROVIDE MORE THAN 12 WEEKS OF LEAVE.

Through the FMLA Congress sought to establish a uniform federal leave policy. The primary guarantee and cornerstone of the FMLA is that all eligible employees should be provided a total of 12 weeks of federally protected leave for covered family and medical reasons. It is the provision of the 12 weeks of leave with which Congress was most concerned. The 12 weeks of leave was a carefully crafted compromise. Congress deliberately selected 12 weeks because it could not get a majority of its members to support a lesser leave period nor a longer leave period. As explained by Representative Ford:

> . . . why 12 weeks and not a longer or shorter time? We started out in the other committee that

> I chaired, the Post Office and Civil Service Committee, with Mr. Clay and Ms. Schroeder and I was pushing a bill that was 26 weeks. . . . But over the years of dealing with this bill, one of the things that people used to attack the bill most often was how do you justify 26 weeks to have a baby? How do you justify 26 weeks to adopt a baby? How do you justify 26 weeks, and we went from one kind of medical emergency to another, and it became a central part of the opposition to the concept of the legislation. And over the years that number was compromised down, and not because 12 weeks made any more sense to the original sponsors of this legislation than 26 – because we could get more people to vote for 12 weeks than we could for 26, and including members of this committee who didn't support the bill at the very beginning but began to support the bill after we modified the number of weeks involved.

(Legislative Hearing on H.R. 1, The Family and Medical Leave Act, Hearing of the Labor-Management Relations Subcommittee of the House Education and Labor Committee, 103rd Cong., 1st Sess., Fed. News Service, January 26, 1993, p. 27).

Because the Department of Labor's ("DOL") employer notice regulations at issue always require unwary employers to provide more than 12 weeks of leave unless the employer specifically notifies the employee prospectively that she is using FMLA leave, the DOL has accomplished through regulation what the congressional sponsors of the FMLA could not – leave in excess of 12 weeks. This is blatantly inconsistent with the purpose and intent of the FMLA.

A. THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS CONFLICT WITH THE EXPRESSED INTENT AND PROTECTIONS OF THE ACT.

The terms of the statute contemplate only that the employer will be required to provide a "total" of 12 weeks of unpaid leave. Entirely absent from the text of the FMLA is any indication that the FMLA was designed to entitle an employee to additional leave under the FMLA when the employer's leave plan already provides for twelve weeks of FMLA leave. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938 (8th Cir. 2000). *See* 29 U.S.C. § 2612(a)(1) ("employee shall be entitled to a total of 12 workweeks of leave during any 12-month period"); 29 U.S.C. § 2612(d)(1) ("If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave . . . may be provided without compensation"). Moreover, the statute does not suggest that the 12-week entitlement may be extended. *See Santos v. Knitgoods Workers' Union, Local 155*, 252 F.3d 175, 178 (2nd Cir. 2001) (noting that 29 U.S.C. § 2612(d)(2)(B) "does not create or supplement employer benefits").

In enacting the FMLA, Congress sought to accommodate the important societal interest in assisting families, by establishing a minimum standard for leave. In the FMLA Congress declared that the statute is designed to "entitle employees to take reasonable leave for medical reasons" and to "accomplish [this purpose] in a manner that accommodates the legitimate interests of employers." 29 U.S.C. §§ 2610(b)(2) & (3). The legislation is based on the same principle as the child labor laws, the minimum

wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment. *See* S. Rep. No. 103-3, at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6.

Although the Act already contained explicit employer notice provisions, 29 U.S.C. § 2619, containing monetary penalties for an employer's failure to post the required notices, the DOL apparently felt that additional employer notice provisions were necessary.[3] *See* 29 C.F.R. §§ 825.208 and 825.700(a). The DOL promulgated these employer notice regulations ostensibly to require the employer to communicate with the employee regarding FMLA leave. (DOL Brief at 4). Where the employer provides for paid medical or vacation leave in circumstances that would also qualify for FMLA leave, DOL regulations allow for the employee to elect, or for the employer to require, any of the following: (1) that the FMLA leave be taken before the non-FMLA leave is taken; (2) that the non-FMLA leave be taken before the FMLA leave is taken; or (3) that the non-FMLA leave and the FMLA leave be taken concurrently. *See* 29 C.F.R. § 825.207. The DOL regulations place the burden on the employer to determine whether requested leave qualifies as FMLA leave and to designate leave as FMLA-qualifying. *See* 29 C.F.R. § 825.208. Notably, "in all circumstances, it is the employer's responsibility to designate leave, paid or

[3] The DOL's final regulations took effect on February 5, 1996, sixteen days before Petitioner began her leave on February 21, 1996.

unpaid, as FMLA-qualifying, based on information provided by the employee," 29 C.F.R. § 825.208(a)(2), and "the employer must immediately notify the employee that the paid leave is designated, and will be counted as FMLA leave." 29 C.F.R. § 825.208(b). If the employer fails to designate the leave as FMLA leave, the employer may not designate leave as FMLA leave retroactively, and may only designate leave prospectively as of the day of notification to the employee of the designation. In such circumstances, the employee is subject to the full protection of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week leave entitlement. 29 C.F.R. § 825.208(c). The DOL also applies the same principle to unpaid employer-provided leave, stating: "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).[4]

Even if the DOL enacted the employer notice regulations pursuant to its statutorily given authority to "prescribe such regulations as are necessary to carry out" the provisions of the Act, 29 U.S.C. § 2654, these regulations go beyond what is necessary to accomplish this purpose. In spite of the statute's explicit expression that eligible employees are only entitled to a total of 12 weeks of

[4] Although 29 C.F.R. § 825.208(c) deals with paid leave and 29 C.F.R. § 825.700(a) deals with paid and unpaid leave, the two regulations are inextricably intertwined for purposes of interpretation of the FMLA.

federally protected leave, following the above DOL-promulgated regulations will in all cases result in an employee receiving greater than 12 weeks leave, unless the employer specifically notifies the employee prospectively that she is using her FMLA leave. Where the employer has provided an employee all the rights conferred on the employee by the FMLA, it should not be found in violation of the FMLA. As the Eighth Circuit properly held, "to find that Wolverine's technical violation of the designation regulations functions as a denial of Plaintiff's FMLA rights would be an egregious elevation of form over substance; a result clearly not contemplated by the FMLA." *Ragsdale*, 218 F.3d at 940. *See Fulham v. HSBC Bank USA*, 2001 WL 1029051 at *4-7, 7 Wage & Hour Cas.2d (BNA) 474 (S.D.N.Y. Sept. 6, 2001); *Twyman v. Dilks*, 2000 WL 1277917, at *11-14, 6 Wage & Hour Cas.2d (BNA) 550 (E.D. Pa. Sept. 8, 2000) (the statute's clearly expressed intent is to provide employees with a minimum and a maximum of twelve weeks of statutorily required leave, without interfering with an employer's decision to give more); *Donnellan v. New York City Transit Auth.*, No. 98 Civ. 1096 (BSJ), 1999 WL 527901 (S.D.N.Y. July 22, 1999) (plaintiff received seventeen weeks of leave, which her employer never designated as FMLA-qualified; the court stated that the "plaintiff was denied nothing more than the labeling of her leave as FMLA-qualified"); *Hensley v. Baptist Hosp.*, 1997 U.S. Dist. LEXIS 22515 (E.D. Tenn. Oct. 27, 1997) (defendant not in violation of FMLA even though it failed to classify leave as FMLA-qualifying where the employee was provided all the leave, benefits and other protections contained in the FMLA); *Lacoparra v. Permanent Home Centers*, 982

F. Supp. 213, 221 (S.D.N.Y. Oct. 10, 1997) (employer's failure to notify plaintiff of the requirements of its FMLA policy did not matter where plaintiff received six months of unpaid leave, continuing insurance benefits and reinstatement); *Dodgens v. Kent Mfg. Co.*, 955 F. Supp. 560, 565 (D. S.C. Feb. 20, 1997) (employer's failure to provide notice required by 29 C.F.R. § 825.301 was not a violation of the FMLA where the employee was not deprived of any leave or benefits required by the statute; to do otherwise "would be elevating form over substance"); *Kur v. Fox Valley Press, Inc.*, 1997 WL 89140 at *3-4 (N.D. Ill. Feb. 20, 1997) (dismissing employee's claim that she was entitled to more than 12 weeks of leave without addressing whether the employer had designated the 12 weeks taken as FMLA leave); *Haggard v. Farmers Ins. Exch.*, 1996 WL 146048 (D. Or. Mar. 25, 1996) (employer's failure to provide notice that employee was using FMLA leave not a violation where employee received 14 weeks of leave).

B. THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS AT ISSUE DISCOURAGE EMPLOYERS FROM ADOPTING OR RETAINING LEAVE POLICIES MORE GENEROUS THAN THOSE REQUIRED BY THE FMLA.

Significantly, and as noted by the Eighth Circuit, the FMLA states that "nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act." 29 U.S.C. § 2653(b). Although the FMLA sets only a minimum entitlement to a period of up

to 12 weeks of unpaid leave, *see* 29 U.S.C. § 2612(c), the Act does not "diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act. . . . " 29 U.S.C. § 2652(a). In addition, the Act establishes that the minimum entitlement may not be reduced or bartered away for other benefits. *See* 29 U.S.C. § 2652(b). Following such leave, the employee is entitled to reinstatement to his or her former position or an equivalent one. 29 U.S.C. § 2614(a). During his or her FMLA leave, the employee is also entitled to remain eligible for certain employee benefits, including enrollment in the employer's group health plan(s). 29 U.S.C. §§ 2612, 2614.

Just as employers are free to pay their employees more than the minimum wage, employers under the FMLA are free to adopt or retain leave provisions over and above the requirements of the FMLA. After enactment of the FMLA, Wolverine chose to retain its more generous leave provisions. Just like the employer who was already paying its employees the statutorily required minimum wage, the new labor standard (FMLA) did not require Wolverine to provide any additional leave benefits since it already exceeded those mandated by the Act.

Indeed, the FMLA was not designed for employers, like Wolverine, who have leave policies more generous than the FMLA. It was designed for those employers (those "unenlightened" companies as they were referred to by Secretary Reich) who did not see the need in allowing their employees time off for the birth or adoption of a child or for serious health conditions. *See* Statements of

Labor Secretary Robert Reich, Legislative Hearing on H.R. 1, The Family and Medical Leave Act, Hearing of the Labor-Management Relations Subcommittee of the House Education and Labor Committee, 103rd Cong., 1st Sess., Fed. News Service, January 26, 1993, p. 37 ("I did not mean to imply . . . that this legislation will in any way burden enlightened companies. Quite the contrary. Enlightened companies are already doing it [providing family and medical leave]. They will not be burdened at all by something they're already doing. This legislation will simply help them in the sense that they may be burdened right now by the fact that other companies which are less responsible create a climate of distrust among employees generally, which those enlightened companies have a slightly harder time overcoming."). *See also* Statements of Sen. Kennedy, The Family and Medical Leave Act of 1993, Committee on Labor and Human Resources, S. Rep. 103-3, 103rd Cong., 1st Sess., p. 5 (Jan. 27, 1993) ("It is a minority of employers who act irresponsibly. Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers.").

Thus, if an employer only provided its employees with four weeks of leave, the FMLA would provide an additional eight. *See* 29 U.S.C. § 2612(d)(1). However, if

an employer provides leave equal to or more generous than that in the FMLA, the enactment of the FMLA bestowed no additional benefits on that employer's employees. Such is the case here. The enactment of the FMLA bestowed no benefit whatsoever on the employees of Wolverine, since its leave policy was already more generous than the statute.

Contrary to the expressed provisions of the FMLA, the DOL's employer notice regulations discourage employers from adopting or retaining leave policies more generous than the requirements of the Act. Employers are discouraged from adopting or retaining leave policies more generous than the Act out of concern that they will be required to provide an additional 12 workweeks of leave, over and above the employer's leave policy, unless the employer specifically and prospectively designates the leave as "FMLA leave." To allow the Petitioner an additional 12 weeks of leave would, in effect, convert the FMLA from a statute which provides a baseline of 12 weeks federally mandated leave, into a statute which mandates an additional 12 weeks of leave for all employees, even for those employees who already have published, collectively-bargained, well-known employer-provided leave policies that grant benefits equal to or more generous than those in the Act. As the Eighth Circuit held, such an interpretation of the Act is glaringly inconsistent with both the text and legislative intent of the statute. *Ragsdale*, 218 F.3d at 940-41.

II. THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS SHOULD NOT BE GIVEN ANY DEFERENCE SINCE THEY ARE CONTRARY TO THE CLEAR INTENT OF CONGRESS AND ARE ARBITRARY, CAPRICIOUS AND MANIFESTLY CONTRARY TO THE STATUTE.

A. Since The Intent Of Congress Is Clear, The Court Must Give Effect To The Unambiguously Expressed Intent Of Congress, That Leave Under The FMLA Be Limited To A Total Of 12 Weeks.

Although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron v. National Resources Defense Council*, 467 U.S. 837, 842 (1984); *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-126 (2000). "The starting point in every case involving the construction of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *TVA v. Hill*, 437 U.S. 153, 173 (1978); *Consumer Products Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In *Garcia v. United States*, 469 U.S. 70, 75 (1984), then, Justice Rehnquist stated for the court, "when we find the terms of a statute unambiguous, judicial inquiry is complete, except in exceptional circumstances."

Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. *See also United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999). "If

Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.' " *Food and Drug Administration*, 529 U.S. at 132.

In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Id.* "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 133. *Accord Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit if possible all parts into an harmonious whole." *Food and Drug Administration*, 529 U.S. at 133 (Internal citations removed).

A court must not defer when it "appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845. In all cases, although the level of deference afforded an agency interpretation may appear high, the court remains the final authority in matters of statutory interpretation and "must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

The purpose and intent of the FMLA is readily apparent from the statutory language and from the pertinent legislative history. Under the *Chevron* analysis, the DOL's employer notice regulations at issue are impermissible

and must be struck down as beyond the clearly expressed purpose and intent of the FMLA.

The Statute plainly states that an "eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period. . . . " 29 U.S.C. § 2912(a)(1). "If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave . . . may be provided without compensation." 29 U.S.C. § 2912(d)(1).

The substantive provisions of the statute show Congressional intent to give employers and employees definite benefits. The provisions of the statute specifying that each employee is eligible for a *total* of 12 weeks of leave per year, if the employee has been employed for more than a year, are meant to give employers and employees assurances as to their respective rights. 29 U.S.C. § 2611(2)(A)(ii); 29 U.S.C. § 2612(a)(1). "The FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires." *Ragsdale*, 218 F.3d at 937.

An indication of the limited nature of the benefit that Congress intended to grant to employees under the FMLA is shown by the provision of the statute that deals with married couples employed in the same workplace. Anticipating that in some workplaces, both husband and wife are employed and may seek leave for the same FMLA qualifying condition, Congress addressed the situation. Section 2612(f) provides:

> In any case in which a husband and wife are entitled to leave . . . , [and] are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –
>
> (1) [for the birth of a son or a daughter and in order to care for such son or daughter, or because of the placement of a son or daughter with the employee for adoption or foster care]; or
>
> (2) to care for a sick parent . . . .

Id.

This provision is instructive with regard to the scope and goals of the FMLA. In the absence of this provision, both the husband and wife would each be eligible to take 12 workweeks of leave any time an event qualifying for leave occurs. Thus, in the case of married employees, the guarantee of 12 workweeks of leave arising from a single event would in effect be converted to 24 weeks of leave. Recognizing the unfairness of this result toward employers in this situation, Congress reduced the possible leave available in the enumerated situations from 24 workweeks to a total of 12 workweeks of leave per qualifying event. This result affirms the FMLA's goals of guaranteeing eligible employees 12 workweeks of medical leave, but it also shows that in practice Congress intended to avoid a situation in which the Statute would award employees with more than 12 workweeks of medical leave.

Similar to the statutory text, the FMLA's legislative history supports the view that the FMLA was intended

only to be a statute that provided a minimum labor standard; an assurance that employers would provide employees with 12 weeks of leave every year.[5] *See* S. Rep. No. 103-3, at 28 (1993), reprinted in U.S.C.C.A.N. 3, 30 ("Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis."); 103rd Cong. H381 (February 3, 1993) (statements of Representative Clay on the Family and Medical Leave Act) ("[A]s America's work force changes to meet the economic realities of the 1990's, it is critical that the work force adapt to accommodate those changes. The Family and Medical Leave Act, of which I have been a principal sponsor for the past 8 years, will provide a minimum labor standard to ease the new workplace burden of balancing the demands of work and family. We are not mandating anything. What we are doing is imposing a standard of work conditions which is just and fair for our work force. . . . The United States alone stands among all industrialized countries in not having this minimum labor standard for its workers."); 103rd Cong. H387 (February 3, 1993) (statements of Representative Snowe on the Family and Medical Leave Act) ("Members of the House, the Family and Medical Leave Act sends a clear message to employers that minimal leave for family crises is as important as workplace safety standards and minimum wage. Dedicated legislators, like the gentlewoman from

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[5] When interpreting a statute the Court will look at all indicia of legislative intent. *Cass v. United States*, 417 U.S. 72, 77-79 (1974); *United States v. American Trucking Associations*, 310 U.S. 534, 542-44 (1940); *United States v. Dickerson*, 310 U.S. 554, 562 (1940).

New Jersey [Mrs. Roukema] and others, have taken pains to ensure that the compromise version of the Family and Medical Leave Act responds to the concerns of the business community. Several safeguards and flexibility measures have been incorporated to protect employers and eliminate potential abuse.").

Any view of the FMLA other than that the twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires will upset the carefully crafted compromise reached by Congress when it passed the FMLA. *See* H.R. Rep. No. 135(1), at 37 (1991) ("The amount of time available for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees' perspective, a 12-week minimum represents a middle ground between the family needs of workers and employer's business needs.").

However, in spite of the text of the Statute and the wealth of legislative comment that 12 weeks was intended to be both the minimum and maximum that an employer would be required to provide, the DOL promulgated regulations that require an employer to provide more than 12 weeks of leave, unless the employer specifically and prospectively informs the employee she is using FMLA leave. According to the regulations, if the employer fails to prospectively inform the employee that the leave she is using is FMLA leave, then "none of the absence preceding the notice to the employee of the [FMLA] designation may be counted against the

employee's 12-week entitlement." 29 C.F.R. § 825.208(c). The DOL regulation at 29 C.F.R. § 825.700(a) basically adopts the language of section 825.208(c) stating that "if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA, the leave does not count against the employee's FMLA entitlement."

The DOL argues that the FMLA enables the worker, at the outset of leave, to plan his medical treatment or care-giving activities with a degree of confidence that an employer's unilateral leave policy could not provide. The Secretary further argues that the full achievement of that statutory purpose requires that the employee be made aware at the outset of the statutory leave period of his rights and responsibilities under the Act. (DOL Brief at 11). Neither the statute nor the legislative history indicates any concern by Congress that employees be notified so as to be able to plan their use of the leave. Further, a reasonable and good faith reading of the Statute would not lead an employee to believe that she is permitted to plan medical treatments or care-giving activities that will last longer than 12 weeks.[6] To the extent that the DOL employer notice regulations seek to fill this perceived gap in the statute it is broader than necessary to achieve its purpose, and is punitive to those employers who have provided at least 12 weeks of leave.

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[6] Here, however, Petitioner argues that she is entitled to 42 weeks of leave (30 weeks of company provided leave, plus 12 weeks of leave specifically designated as FMLA leave) apparently to plan her cancer treatments.

The controversy surrounding the scope of the FMLA when it was passed adds support to the position that the Department of Labor exceeded the Statute when it issued the employer notice regulations. Looking at the context of the statute is appropriate when considering whether to strike an agency regulation. *See Christensen v. Harris Co.*, 529 U.S. 576, 583 (2000). The FMLA was passed by Congress over the objections of many employers. To address the concerns of employers fearful of a new unrestrained federal mandate, employers were given assurances that this was a limited statute that simply instituted policies that were like those that many of the best employers were already granting.

The purpose of the statute compared to other legislation also militates against the employer notice regulations. The FMLA is not remedial. Thus, unlike other federal employment statutes, it should not be construed broadly to the achievement of remedial goals. The court "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *See United States v. Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 800 (1969) (expressing similar concern toward statutes protecting public health). *See also Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (favorably citing *Article of Drug*). Since the FMLA is not construed broadly, it is not appropriate to interpret the statute solely for the benefit of employees. Rather, the statute should be interpreted impartially giving equal deference to all affected parties. If the FMLA is viewed in this way, the employer notice regulations are invalid to the extent they change the balance in the statute between employers and employees.

To the extent the DOL employer notice regulations require employers to provide, or employees to receive, more than 12 weeks of leave, the regulations are contrary to the clear intent of the statute.

B. Even If The Court Finds That The FMLA Is Somewhat Ambiguous And That Congress Left A Gap For The Regulations To Fill, They Must Still Be Held Invalid As They Are An Impermissible Construction Of The Statute.

Under *Chevron*, if Congress has not spoken on the issue and has explicitly or implicitly left a gap for regulations to fill, then the court must consider whether the agency's interpretation of the statute is based upon a permissible construction of the statute. *Chevron*, 467 U.S. at 843-44. *See also INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is "reasonably related to the purposes of the enabling legislation"). Under this second step of the *Chevron* analysis, an agency's interpretation ordinarily is accorded deference, unless the regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. *See United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001) (The agency's construction of the statute is permissible when it is not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute).

Recent cases from this Court have shown flexibility in applying *Chevron*. The Court has invalidated agency actions where it found that Congress spoke directly to an issue subject to regulation, and the agency regulation

conflicted with the clear intent of Congress, as well as where Congress left the precise issue open, and the agency action nonetheless went beyond a permissible interpretation of the statute. *Compare Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (finding intent of Congress clear and striking regulations) *with N.L.R.B. v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001) (finding statute ambiguous, but striking regulation as going beyond the limits of the statute). Here, even if the Court finds the FMLA to be somewhat ambiguous, the Court should strike the DOL's employer notice regulations.

A recent Supreme Court case lends support to the invalidity of the DOL's employer notice regulations. In *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 121 S. Ct. 903 (2001), the respondents, a group representing trucking companies, argued that under the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, the EPA had the authority to consider the cost of implementation when it set air quality standards, even though the language of the statute only permits the EPA to consider public health considerations. The respondents argued that, although the cost of implementation was not specifically mentioned in the statute, an implied purpose could be found in the statute to consider implementation costs. *Whitman*, 121 S. Ct. at 910.

The Court found that there was no language in the statute directing the EPA to consider the cost of implementation. Further, to the extent that the authority to consider the cost of implementation was implied from the statute, it would conflict with the specific and explicit provisions of the statute that require the EPA to consider

public health concerns when setting air quality standards. Because of the conflict between the proffered implied purpose of the statute, and the clear intent of the statute, the Court concluded that if Congress had wanted to give life to the implied purpose of considering the cost of implementation, it would certainly have mentioned it if it had meant it to be considered. Since Congress did not mention this purpose, and the purpose conflicts with a stated purpose mentioned, it is invalid. *Whitman*, 121 S. Ct. at 910. The Court found that while the Clean Air Act, was "to some extent ambiguous," the agency's interpretation of the statute went "beyond the limits of what is ambiguous and contradict[ed] what . . . is quite clear." On this basis, the regulation was struck down. *Whitman* stands for the proposition that where an implied purpose of a statute, one not explicitly stated in the text of the statute, is sought to be given effect, and that implied purpose conflicts with the clear intent of Congress, the implied purpose could only be valid if Congress had expressly included it in the statute. *See Whitman*, 121 S. Ct. at 901-910.

Here, the Department of Labor argues that the implied purpose of the employer notice regulations, to aid employees in planning their family and medical leave, is valid and consistent with its authority under the Statute to "prescribe such regulations as are necessary to carry out" the provisions of the Act. *See* 29 U.S.C. § 2654. Both Petitioner and the Department of Labor must admit that the purpose of aiding employees in planning their leave is not mentioned anywhere in the text of the FMLA. Further, the operation of the DOL's employer notice regulations here, creating an open-ended leave entitlement,

conflict with the expressed and primary purpose of the FMLA, granting employees a total of 12 weeks of FMLA leave, as well as Congress' admonition that the statute is not to be construed so as to discourage more generous employer leave provisions.

In *Whitman*, the Court also cautioned against allowing apparent gaps in Congress' directions in a statute to be used by the regulatory agency to render provisions of the statute nugatory in practice. *See Whitman*, 121 S. Ct. at 918. To allow regulations to render express provisions of the statute inoperative "is to go over the edge of reasonable interpretation. The [agency] may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit . . . " the statute's application. *Whitman*, 121 S. Ct. at 918-919. Here, the actions of the employer notice regulations render nugatory the statutory provisions providing a total of 12 workweeks of leave, as well as the provision that the statute will not discourage more generous leave plans.

C. The Department Of Labor's Employer Notice Regulations Are Not Supported By The Notice Provisions Contained In The FMLA.

The regulations ignore the fact that employers in the United States usually provide some private leave benefits. Outside of the somewhat narrow leave benefits provided by the FMLA, employees often have a range of employer provided leave benefits to use in varying circumstances. Both the statute and legislative history reflect Congress' intent to fashion this leave consistent with employers' existing leave policies. The statute was

designed to provide a uniform minimum leave amount, which may or may not require employers to modify the amount of leave provided to employees.

The regulation's assumption that the only way an employee would know how much family or medical leave she had remaining would be if the company formally designates the leave is not appropriate or needed where, as here, the employer has a published leave policy more generous than the FMLA. Not only was Wolverine's policy published in the employee handbook, but it was also contained within the collective bargaining agreement between Wolverine and the employees' union. The policy provided for seven (7) months (30 weeks) of job-protected leave for reasons covered by the FMLA. It also contained other provisions more generous than contained in the FMLA. Because of the publicized and well-known nature of Wolverine's leave policy, after Ragsdale used the first month of leave she was aware, without Wolverine otherwise informing her, that she had six months of leave remaining. Ragsdale was able to plan her leave accordingly.

In addition, the employer notice regulations are not supported by the notice provisions contained in the statute, to the extent that the regulations unfairly penalize employers who fail to give adequate notice to employees that leave is FMLA leave. Where Congress wanted explicit notice provisions with significant consequences, it provided for them. 29 U.S.C. § 2613 (detailing notice requirements for employees seeking leave). In 29 U.S.C. § 2612(e)(1), the statute details notice obligations of employees to employers when the employee requests qualifying leave under the FMLA. *See Carter v. Ford Motor*

Company, 121 F.3d 1146 (8th Cir. 1997) (holding that employee merely informing the employer that he would be out and did not know when he would return and offering no further information was not adequate notice under the FMLA). In 29 U.S.C. § 2614(b)(1)(A), the FMLA allows an employer to refuse to restore a "highly compensated employee" to his or her former position if holding open the position would cause "substantial and grievous economic injury to the operations of the employer." In order to do so, however, the employer must give notice to the employee "at the time the employer determines such injury would occur" that the employer does not intend to restore the employee to his or her position. *See* 29 U.S.C. § 2614(b)(1)(B).

The notice provided by Congress in the form of a posting requirement is the required and adequate notice used for most every state and federal employment statute including Title VII, the Americans with Disabilities Act, The Age Discrimination in Employment Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, state Workers' Compensation acts, state wage payment acts, and a number of other employment statutes. It is unclear from the FMLA that Congress intended the DOL to go beyond this statutory employer notice.

Finally, where the FMLA does contain penalties arising from notice violations, it provides for monetary penalties to encourage compliance. *See* 29 U.S.C. § 2619 (assessing monetary penalties for employers who do not post notices on the premises of the employer explaining FMLA rights). The preference for monetary penalties, like in the Fair Labor Standards Act, is instructive. An obvious alternative to the DOL to ensure that employees

receive notice of their leave rights is to levy monetary sanctions against employers that fail to give notice under the regulations.

With regard to the balance Congress explicitly struck between employers and employees, *see* 29 U.S.C. § 2601(b)(1) & (3) (The FMLA's purpose is to "balance the demands of the workplace with the need of families . . . in a manner that accommodates the legitimate interests of employers."), the employer notice sanctions shift that balance in a manner not intended by Congress. The statutory provisions indicate that Congress intended employees to bear much, if not most, of the notice requirements under the statute. They must request leave, they must provide reasonable notice of the need for leave, and they must satisfy the various certification requirements, which occur several times in the leave process. The DOL's employer notice provisions take the balance that Congress created concerning notice requirements, strip employees of their basic responsibilities under the Act, and make employers the absolute guarantors of employees' rights under the Statute by imposing overbroad penalties for an employer's failure to adhere to its regulations.

Neither the goals nor purposes of the FMLA, nor considerations of possible harmful effects toward employees justify upholding the regulations. There is nothing about the text or goals of the FMLA that would make striking these regulations unfair or improper. Unlike other statutes administered by the Department of Labor, the FMLA is a statute with very specific goals and intent. It was not intended to remedy past abuses. The improper nature of the DOL's employer notice provisions

is outlined by the fact that even as the employer notice provisions upset the balance contained in the statute concerning notice burdens, they sanction employers in a manner that burdens the core provision of the statute; the simple guarantee to eligible employees of a uniform, total of 12 workweeks of family and medical leave. More importantly, the striking of this regulation will not produce a disproportionately negative impact on employees.

III. THE DEPARTMENT OF LABOR APPEARS TO HAVE EXCEEDED ITS RULEMAKING AUTHORITY IN ITS PROMULGATION OF THE PROPHYLACTIC EMPLOYER NOTICE REGULATIONS GIVEN THAT CONGRESS ONLY GRANTED IT GENERAL RULEMAKING AUTHORITY IN THE FMLA.

The Department of Labor characterizes the employer notice regulations (which penalize employers who fail to give timely notice in accordance with their provisions) as "prophylactic" regulations that provide as a categorical matter that otherwise qualified periods of leave will not be counted as FMLA leave if the employer fails to give timely notice that the leave will be so treated. (DOL Brief at 20). The Department of Labor admits that the prophylactic regulations will sometimes place the employee in a better position than if the employer had complied with the regulations. Further, the Department of Labor admits that in this matter the effect of the prophylactic regulations was to create a viable FMLA cause of action where one would not otherwise exist, even though Ragsdale would not have been able to return to work at the end of 12 weeks of leave if notice had been given. (DOL

Brief at 20). The prophylactic notice regulations were chosen because a categorical rule is more predictable and easier to administer than a non-prophylactic rule. (DOL Brief at 20-21).

In support of its argument that the prophylactic regulations here are valid, the Department of Labor cites to cases in which Congress granted administrative agencies remedial rulemaking authority. (DOL Brief at 22-23). Congress can grant regulatory authority in various ways, including both general and specific grants of authority. *Compare* 42 U.S.C. § 2000e-12(a) (granting general authority to the Equal Employment Opportunity Commission to issue "suitable procedural regulations to carry out the provisions of [Title VII]") *with* 15 U.S.C. §§ 78n(e) & 78w(a)(1) (granting the Securities and Exchange Commission general administrative authority, but also giving the Commission the power to define by rules and regulations and prescribe means "reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."). In the FMLA Congress granted its basic regulatory authority, providing that the Secretary of Labor may "prescribe such regulations as are necessary to carry out . . . " the Act. 29 U.S.C. § 2654. This general grant of administrative authority is not the type of grant that will generally support a prophylactic regulation.

The Department of Labor relies on two Supreme Court cases to support its authority to promulgate the prophylactic employer notice regulations. It cites *Mourning v. Family Publications Serv.*, 411 U.S. 356 (1973) and *United States v. O'Hagan*, 521 U.S. 642 (1997), as cases where broad prophylactic regulations were approved by

this Court. (DOL Brief at 22-23). However, the Department of Labor misconstrues the import of these cases. In *Mourning* and *O'Hagan*, Congress had given the respective agencies explicit remedial authority beyond the standard administrative authority. This led to the adoption of prophylactic regulations.

In *Mourning v. Family Publications Serv.*, the Court considered whether the Federal Reserve Board exceeded its administrative authority under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, when it issued rules requiring Truth in Lending disclosures in situations in which there were no finance charges. 411 U.S. at 372. A creditor found in violation of the Act challenged the regulations, arguing that the Truth in Lending Act only applied to situations involving finance charges. *Id.* The Court reviewed the grant of authority given to the Board in the statute. In addition to the general grant of regulatory authority, the statute provided that:

> These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Mourning, 411 U.S. at 361-62, 365-66.

The Court found that the above grant of remedial authority permitted the Federal Reserve Board to issue regulations that might go somewhat beyond the language of the statute. The Court wrote that the grant of remedial authority was made by Congress due to its knowledge

that "adroit and unscrupulous" creditors would try to characterize their transactions "so as to fall one step outside whatever boundary Congress attempted to establish. . . . " The grant of prophylactic authority was intended by Congress to empower the Federal Reserve Board to draft rules that could prevent creditors from evading the statute, no matter what method was utilized. *Mourning*, 411 U.S. at 359-60. Based on this goal, the Court found that the regulations were valid.

The *Mourning* decision stresses two levels by which Congress can give administrative authority. "Where the empowering provision of the statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of the Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' " *Mourning*, 411 U.S. at 369 (citing *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280-81 (1969)). However, where enabling provisions also provide more specific authority to the administrative agency, such as the authority to remedy attempts to evade the purposes of the statute, a greater level of deference to administrative rulemaking exists, rising to an abuse of discretion standard. *Mourning*, 411 U.S. at 370-71 (quoting *Gemsco, Inc. v. Walling*, 324 U.S. 244, 255 (1945)). In *Mourning*, since Congress expressly gave the Federal Reserve Board authority to regulate to prevent evasion of the statute, the Board acted within its authority in promulgating a prophylactic regulation that was broad in its application.

Similarly, in *United States v. O'Hagan*, 521 U.S. 642 (1997), this Court considered the validity of regulations promulgated to enforce fraud provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. *Id*. at 646-47. The regulations in question broaden the reach of the statutory fraud provisions that prohibit a person from engaging in insider trading of stocks, to reach insider traders that have no fiduciary relationship to participants in the offer in question. An attorney prosecuted for fraud challenged these regulations, and the challenge was reviewed by this Court. *Id*. at 649.

As discussed by the Court, the Securities Exchange Act of 1934 contains two grants of rulemaking authority. Section 78w(a)(1) grants the Securities and Exchange Commission (SEC) general rulemaking authority. In addition, the statute contains a more specific grant, which provides that "the [SEC] shall, for the purposes of the [fraud] subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 78n(e).

In reviewing the regulation, the Court noted that section 78n(e) "delegates definitional and prophylactic rulemaking authority to the [SEC]." *O'Hagan*, 521 U.S. at 667. "A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited." *Id*. at 672-73.

The Court found the prophylactic rule related to insider trading valid not because of the grant of general rulemaking authority, but rather because Congress, as part of the Securities and Exchange Act, gave the SEC

specific authority to engage in just this sort of rulemaking. *See Id*. at 676 ("Rule 14e-3(a) is a proper exercise of the Commission's prophylactic power under § 14(e)."). This prophylactic power is contrasted from the Commission's general rulemaking power contained in 15 U.S.C. § 78w(a)(1). *See also Gemsco v. Walling*, 324 U.S. 244, 257-58 (1945) (finding valid FLSA remedial regulation based on statutory language directing DOL to "prevent the circumvention or evasion" of wage orders).

Unlike the statutory provisions in *Mourning* and *O'Hagan*, which contained specific prophylactic rulemaking authority, when Congress adopted the FMLA, it gave the Department of Labor the standard agency power to regulate, but it did not give the Department of Labor specific prophylactic rulemaking instructions. The lack of specific prophylactic authority calls into question the authority of the Department of Labor to issue broad prophylactic regulations here. Further, it puts into focus Respondent's argument that the prophylactic employer notice regulations needlessly conflict with the plain text of the FMLA.

The characterization of the employer notice regulations as prophylactic regulations by the Department of Labor is meant, in part, to excuse the fact that the regulations go beyond the plain language of the FMLA. However, characterizing these regulations as prophylactic or categorical does not give the Department of Labor any leeway to promulgate regulations that go beyond the intent of Congress, and which violate the express provisions of the statute. The cases the Department of Labor cites in support of its authority to issue prophylactic regulations here involve statutes that granted the agency

greater authority to regulate than here. These cases do not support the Department of Labor's prophylactic regulation here.[7]

IV. REGARDLESS OF THE VALIDITY OF THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS, WOLVERINE'S FAILURE TO DESIGNATE PETITIONER'S 30-WEEK LEAVE AS FMLA LEAVE DID NOT OTHERWISE INTERFERE WITH OR RESTRAIN PETITIONER'S EXERCISE OF HER FMLA RIGHTS.

Even assuming the DOL employer notice regulations are valid, Wolverine's failure to specifically designate any of Petitioner's 30-week leave as FMLA leave did not otherwise interfere with or restrain Petitioner's exercise of her FMLA rights. Petitioner received 30 weeks of leave prior to being terminated under Wolverine's sick leave policy, and Petitioner was granted the full benefits conveyed by the FMLA. Moreover, the Petitioner was unable to work at the conclusion of the 30-week leave in September 1996. In fact, Petitioner was unable to return to full-time work until December 31, 1996. Therefore, under the

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[7] Contrary to the Department of Labor's implication in its Brief that Respondent's argument is somehow that the regulations are deficient because it is overbroad (DOL Brief at 22-23), it is Respondent's position that Congress gave the Department of Labor standard agency authority when it drafted the FMLA, and that the Department of Labor exceeded that authority by promulgating unwarranted prophylactic regulations that squarely conflict with the purpose of the statute, to ensure that employers give qualified employees a total of 12 weeks of family and medical leave per year.

circumstances, no relevant consequence attended Wolverine's failure to designate Petitioner's leave as FMLA leave.

The Second Circuit applied the same reasoning to a case in which the plaintiff alleged he had been deprived of proper notice required by the FMLA and DOL regulations, *i.e.*, he was not told that he was limited to 12 workweeks of leave. In *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155 (2d Cir. 1999), the plaintiff had suffered a serious injury, rendering him unable to perform his job and requiring an immediate, unanticipated leave. The plaintiff was placed on FMLA leave. When, after 12 weeks of unpaid leave, the plaintiff was unable to return to work, he was fired. The district court dismissed the plaintiff's FMLA claim, finding that even if the defendant had failed to provide proper notice to the plaintiff, it did not deny, interfere with, or restrain his exercise of FMLA rights, because the plaintiff had received all of the substantive rights conferred upon him by the FMLA. The Second Circuit affirmed, holding that no rational fact finder could conclude that the plaintiff's exercise or attempted exercise of his FMLA rights was in any way affected by the defendant's failure to inform him that the FMLA entitled him to a leave of up to 12 workweeks. The court reasoned that because the plaintiff's leave was necessitated by an unanticipated medical condition, and because his inability to return to work continued well beyond his 12-week leave, it was impossible for the defendant's alleged failure to give proper notice to have interfered in any way with the plaintiff's exercise of his FMLA rights. *See also Donnellan v. New York City Transit Auth.*, No. 98 Civ. 1096 (BSJ), 1999 WL 527901 (S.D.N.Y.

Jul. 22, 1999) (transit authority did not violate FMLA when it failed to restore employee, who was laid off as part of a reduction in force after having received 17 weeks of leave following her injury, to the position she held prior to layoff, where the right to be restored to the former position only obtains when the employee is able to return to her position at the conclusion of the FMLA leave, and the employee remained unable to return to work until approximately 40 weeks after she had been laid off and more than one year after she had commenced her leave).

Therefore, Respondent did not interfere with Petitioner's rights under the FMLA, since she received all the benefits to which she was entitled under the FMLA and since she was unable to return to her position at the conclusion of her leave period. Here, Petitioner did not return to full duty until December 31, 1996, more than three months after her employment was terminated, and more than ten months after she commenced her leave. Under such circumstances, Respondent should not be said to have interfered with Petitioner's FMLA rights.

CONCLUSION

For the above reasons, Respondent Wolverine World Wide, Inc., respectfully requests this Honorable Court find that the DOL's employer notice regulations at 29 C.F.R. § 825.208 and 29 C.F.R. § 825.700(a), are contrary to the plain text of the FMLA and go beyond the intent and purpose of Congress in enacting the FMLA, and to the extent they attempt to fill any gaps left by the statute they

are an impermissible interpretation of the statute, and should be held invalid. Furthermore, Wolverine's failure to follow the DOL's employer notice regulations, to the extent they are valid, did not otherwise interfere with or restrain Petitioner's exercise of her FMLA rights.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

29 U.S.C. § 2601 FINDINGS AND PURPOSES

(a) Findings

Congress finds that –

(1) the number of single parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family care-taking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;

(3) to accomplish the purpose described in paragraph (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

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29 U.S.C. § 2612 LEAVE REQUIREMENT

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of each employee.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) and (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that –

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of Notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under

such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned medical treatment the employee –

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by same employer

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

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29 U.S.C. § 2613 CERTIFICATION

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section 2512(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states –

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under the subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer,

that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A healthcare provider designated or approved under paragraph 1 shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third healthcare provider designed or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section

(2) Finality

The opinion of the third healthcare provider concerning the information certified under subsection (b) of this section shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

29 U.S.C. § 2615 PROHIBITED ACTS

(a) Interference with Rights

(1) Exercise of Rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with Proceedings or Inquiries

It shall be unlawful for any person to discharge or in any manner discriminate against any individual because such individual –

(1) Has filed any charge, or has caused to be instituted any proceeding, under or related to this subchapter;

(2) Has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) Has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

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29 U.S.C. § 2619 NOTICE

(a) In General

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge.

(b) Penalty

Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.

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29 U.S.C. § 2652 EFFECT ON EXISTING EMPLOYMENT BENEFITS

(a) More Protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less Protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

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29 U.S.C. § 2653 ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES

Nothing in this Act or any amendment by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

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29 U.S.C. § 2654 REGULATIONS

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

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29 C.F.R. § 825.208

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the

employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying

reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave – consistent with the employer's established policy or practice – and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to

the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent from an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work,

promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

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29 C.F.R. § 825.700(a)

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(8)

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In The

Supreme Court of the United States

TRACY RAGSDALE, et al.,

Petitioners,

v.

WOLVERINE WORLDWIDE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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I. UNDER SECTION 2654 THE SECRETARY OF LABOR HAS THE AUTHORITY TO REQUIRE EMPLOYERS AND EMPLOYEES TO PROVIDE NOTICE AND INFORMATION TO ONE ANOTHER

Respondent presents an assault on the FMLA regulations far more sweeping than the opinion of the court of appeals. The Eighth Circuit held that the notice and designation requirement in 29 C.F.R. § 825.208(a) would be valid in any case in which the employee actually has a need for that information. (J. App. 104-05). Respondent, on the other hand, contends that a notice requirement like section 825.208 is invalid regardless of whether the employee in fact needs the information that it would provide.

Respondent argues that the Secretary of Labor cannot impose on either employers or employees *any* notice or information requirements beyond the provisions contained in the text of the statute. (R.Br. 29-30). According to respondent, Congress, except in those instances specifically addressed in the statute itself, simply did not care whether employees ever received information that would enable them to utilize or plan the use of FMLA leave. (R.Br. 23, 27).

Respondent's argument would eviscerate large portions of the FMLA regulations, including numerous provisions that are of substantial practical importance to employers. The FMLA regulations are replete with requirements, not found in the text of the statute itself, that employees and employers provide notice or information to one another. The obligations imposed on

employees serve to reduce the burdens and inconvenience that FMLA leave might otherwise pose for employers. The requirements established for employers assure that employees have the information needed to exercise their rights and to meet their obligations under the FMLA. These often inter-related provisions operate to facilitate cooperation and consultation between employers and employees. "The regulations expec[t] disputes to be resolved through discussions between the employee and the employer at the beginning of the leave rather than at the end." 60 Fed. Reg. 2180, 2207 (Jan. 6, 1995).

Section 2612(e) of the FMLA requires FMLA-eligible workers to provide employers with notice of their "intention to take leave." The regulations, however, direct employees seeking FMLA leave to do significantly more. Under the regulations a worker must also give his or her employer sufficient information "to allow the employer to determine that the leave qualifies under the Act." 29 C.F.R. § 825.208(a)(1).[1] The employee must indicate the "timing and anticipated duration of the leave." 29 C.F.R. § 825.302(c).[2] Once the employee is on leave, he or she is

[1] The FMLA contains no requirement that an employee provide information in connection with leave under section 2612(a)(1)(A) (leave to care for a newborn child) or section 2612(a)(1)(B) (leave because of the placement of a foster child.) With regard to health related leave under sections 2612(a)(1)(C) and 2612(a)(1)(D), an employer is authorized by the statute only to require information in the form of a medical certification. 29 U.S.C. § 2613.

[2] The statute does not require an employee seeking leave under sections 2612(a)(1)(A) or 2612(a)(1)(B) to provide any

required to provide notice "if dates of scheduled leave change or are extended." 29 C.F.R. § 825.302(a). If the employee is seeking intermittent leave, he or she must provide the employer with information detailing "why the intermittent . . . leave schedule is necessary", 29 C.F.R. § 825.302(f),[3] and with notice regarding any changes in the schedule. 29 C.F.R. § 825.302(a). An employee may be obligated to give his or her employer notice two days prior to returning to work, 29 C.F.R. §§ 825.309, 825.312(e).

The notification duties imposed on employers by the regulations are of three distinct kinds.[4] First, the

information about the expected duration of the leave. Where an employee seeks leave under section 2612(a)(1)(C) to care for certain relatives, the employer may require a medical certification stating how long the employee will be *needed* to care for that relative. 29 U.S.C. § 2613(b)(4)(A). It does not require a statement as to the amount of the expected leave, which could of course be a shorter period. For example, a doctor's statement that the employee was needed to care for the relative indefinitely would not inform the employer how long the leave would last. In the case of leave under section 2612(a)(1)(D), where the employee has a serious medical condition and is unable to work, the medical certification must state that the worker *is* unable to work, and explain how long the underlying condition will last, but the certification need not address whether (as will frequently occur) the need for leave might end at some point prior to the worker's complete recovery from the underlying medical condition. 29 U.S.C. §§ 2613(b)(2), 2613(b)(4)(B).

[3] The statute itself permits the employer to require a medical certification that intermittent or reduced schedule leave "is necessary", not *why* that is so. 29 U.S.C. § 2613(b)(4)(B)(7).

[4] In addition to the more specific notification requirements described *infra*, the employer is required to include a summary

employer must provide workers with information about their rights under the FMLA. In addition to requirements of general information, e.g., 29 C.F.R. § 825.301(a)(1), the regulations identify certain specific rights which must be mentioned. E.g., 29 C.F.R. § 825.301(b)(1)(iii) (right to substitute paid leave for FMLA leave).[5] Second, the employer is required to alert employees to their numerous obligations under the FMLA, including their duties to provide advance notification of the need for leave,[6] their obligation while on leave to pay a share of health benefit premiums,[7] the possible need to provide a fitness-for-work certification when they return from medical leave,[8] their responsibility to give the employer two days notice prior to returning to work,[9] and their possible liability for the employer's medical benefit costs if they do not ultimately return to work.[10] Third, the employer is required to provide where relevant certain information

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of the employee's FMLA rights and obligations in any written employee handbook, 29 C.F.R. § 825.301(a)(1), and to respond to an employee's questions about those rights and duties. 29 C.F.R. § 825.301(d).

[5] See 29 C.F.R. §§ 825.110(d) (date when employee will become eligible for FMLA leave), 825.209(d) (right to change medical benefit plans).

[6] 29 C.F.R. § 825.304(i).

[7] 29 C.F.R. §§ 825.210(d), 825.301(b)(1)(iv).

[8] 29 C.F.R. §§ 825.301(b)(1)(v), 825.310(e).

[9] 29 C.F.R. § 825.309(c).

[10] 29 C.F.R. § 825.301(b)(1)(viii).

which an employee may need to exercise his or her rights under the FMLA.[11]

The most important notification required of employers occurs when the employer learns that a worker needs leave that meets the requirements for FMLA leave. The regulations provide a list of rights and duties that must be called to the employee's attention at that time, 29 C.F.R. § 825.301(b), and the Secretary of Labor has issued a model form (WH-381) which an employer can use for this purpose. (See Brief Appendix). Four of the eight elements of the section 825.301(b) notice concern an employee's obligations under the FMLA.[12] Notice that an employer has (or has not) designated an employer-sponsored leave plan as also constituting FMLA leave is one of the elements of the section 825.301(b) notice.

The Secretary has reasonably concluded that the implementation of the FMLA requires such exchanges of information. The statute imposes obligations on and

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[11] 29 C.F.R. §§ 825.200(d)(1) (method used by employer to calculate one year period under FMLA), 825.200(e) (same), 825.212(a)(1) (employer intent to end medical benefits because employee has failed to pay premiums), 825.219(a) (designation of employee as a "key" employee and explanation of potential consequences), 825.301(b)(1)(vi) (same), 825.307(d) (copies of medical opinions obtained by employer).

[12] 29 C.F.R. §§ 825.301(b)(1)(ii) (duty to provide medical certification of a serious health condition), 825.301(b)(1)(iv) (employee's obligation to pay health benefit premiums), 825.301(b)(1)(v) (employee's obligation to provide a fitness-for-duty certificate in order to be restored to employment), 825.301(b)(1)(vii) (employee's potential liability for employer's share of health benefit premiums).

accords rights to employers and employees alike; it will ordinarily be the case that employers and employees need information from one another in order to meet their respective obligations and exercise their respective rights. This system frequently operates to the considerable advantage of employers. The information required from employees will permit the employer to plan personnel matters. In addition, employees with the requisite information are more likely to meet their statutory obligations to their employers.

The FMLA cannot fairly be read to preclude the Secretary from requiring employees and employers to provide such information to one another. The fact that the FMLA itself does identify some such notices or information reflects only a congressional decision to establish certain minimum information that must be provided, not to preclude the Secretary from requiring more. Having delineated several types of information that it concluded were clearly important, Congress left to the Secretary the task of identifying other necessary information.

It cannot be the case, as respondent suggests, that Congress did not care whether employees (or employers) lacked the sort of information required by the regulations, and had no interest in whether workers could use such information to plan their leaves. Without such information and planning, the substantive rights accorded by the Act would be meaningless. Section 2612(b), for example, guarantees workers with a serious health condition the right to take FMLA leave on a part-time basis. Congress assuredly realized that section 2612(b) would be entirely ineffective if workers did not actually *know* that they were entitled to work part time under the FMLA, and it would have understood that few employees would

be able on their own to learn that federal law accorded them such a right.

Effective implementation of the FMLA obviously requires that employees have timely information about their rights under the statute. The only information guaranteed to workers by the FMLA itself is that contained in the poster required by section 2619, and certain warnings to high level employees who may be outside the statutory right of restoration. 29 U.S.C. § 2614(b)(1)(B). Congress could not possibly have believed that these two provisions alone would be sufficient to enable workers to learn of and exercise their rights, and cannot have intended to forbid the Secretary to require more.

II. THE RIGHTS ACCORDED TO EMPLOYEES UNDER THE FMLA ARE NOT LIMITED TO TWELVE WEEKS OF LEAVE

Respondent's attack on the validity of the FMLA regulations rests largely on a clear, pivotal, and palpably erroneous premise – that the sole right accorded to workers under the FMLA is a total of twelve weeks (per year) of leave for one of the statutory purposes.[13] On respondent's view an employer has fully met its obligations under the Act if during the year it has provided a worker with twelve weeks of leave, regardless of what the terms or conditions of that leave may have been. Since petitioner received more than twelve weeks of leave, respondent argues, the company fully satisfied its statutory obligations. Because it had completely complied

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[13] R.Br. 5, 9, 12, 25, 32, 38, 40.

with the FMLA, Wolverine insists, the regulations could not validly require it to do more.

The terms of the FMLA, however, expressly provide employees with five important rights in addition to twelve weeks of leave. First, certain employees (including petitioner) are entitled to work either part time or intermittently. 29 U.S.C. § 2612(b). This permits such employees to extend the period during which they are not working full time, and enables them to earn a substantial income. Thus an employee who was able to work an average of 20 hours of her regular 40 hour workweek could remain on leave for a total of 24 weeks, during which she would earn 12 weeks of wages. Second, all employees, if offered only unpaid leave, are entitled to substitute paid leave, such as vacation leave. 29 U.S.C. § 2612(d). Although this does not extend the total period of leave, it can result in significant income. Third, the FMLA limits the amount of medical information which an employee can be required to provide, and restricts the frequency with which it must be reconfirmed. 29 U.S.C. § 2613. Fourth, an employee returning from leave protected by the FMLA has a bundle of specific restoration rights; he or she must be restored to the same or an equivalent position and his or her accrued employment benefits cannot be reduced. 29 U.S.C. § 2614(a). Fifth, an employer must continue to provide health benefits under the same terms and conditions that would have existed had the employee continued to work. 29 U.S.C. § 2614(c).

Notification is an important aspect of compliance with the FMLA. Two of the FMLA ancillary rights – the right to work part time and the right to substitute paid leave – are options which must be affirmatively exercised

by an employee. Unlike, for example, continued health insurance coverage, which an employer can and must provide independent of any action or knowledge on the part of the worker, an employee must ask to work part time or to substitute paid leave. There is little chance that an employee will do so if he or she does not know that these options exist, particularly if the employee has not been notified that the employer has designated the leave as FMLA leave.

More broadly, by notifying an employee that he or she is being accorded FMLA leave, an employer commits itself to providing to the worker all of the ancillary FMLA rights, and simultaneously alerts the employee to the need to monitor whether the employer is in fact providing those rights. The bundle of rights provided by a company sponsored plan will often be inferior in at least some respect (although perhaps more generous in others) to the FMLA rights.[14] To the degree that the company-plan rights are more limited, notification that a worker is on FMLA leave is a commitment by the employer to provide those more generous FMLA ancillary rights.

The absence of section 825.208(a) notice in this case was entirely deliberate. No such notice was given precisely because Wolverine officials insisted that Ragsdale was *not* entitled to FMLA leave, and thus was not entitled to any ancillary FMLA rights more generous than the

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[14] In the instant case, for example, Wolverine's leave policy does not permit intermittent or reduced schedule leave, does not permit substitution of paid leave, and requires periodic medical recertification not necessary for FMLA leave.

company's own plan. The company's decision not to notify Ragsdale that she was receiving FMLA leave was part and parcel of the employer's decision not to accord her those FMLA rights.

Respondent mistakenly insists that Congress intended that the FMLA never result in more than twelve weeks of leave. To the contrary, the FMLA can require just that result in a number of distinct circumstances. (1) Under section 2612(d), a period of unpaid FMLA leave cannot reduce a worker's pre-existing accrued paid leave unless the worker (at his or her own initiative or at the demand of the employer) has substituted that paid leave for FMLA leave. In the absence of such substitution, the FMLA itself guarantees that at the end of the twelve week FMLA period the employee can remain on leave for an additional period equal to his or her earlier accrued entitlement. (2) If an employer requires a worker to be on leave during a period when he or she is in fact willing and able to work – such as by not allowing part time work under section 2612(b), or by requiring certain school employees to go on leave toward the end of the academic year, see section 2618 – that involuntary leave does not count towards the worker's FMLA entitlement. 29 C.F.R. §§ 825.203(d), 825.204(e), 825.303(b). (3) Under certain circumstances the provisions of the Fair Labor Standards Act forbid including certain leave periods as part of the FMLA period. 29 C.F.R. §§ 825.207(b), 825.208(i). In all of these situations enactment of the FMLA can result in total leave periods in excess of twelve weeks.

In the instant case, the months of company-sponsored leave, although substantially greater in length than

twelve weeks, did not include a number of the ancillary rights that are legally mandated elements of FMLA leave. (See n. 14, *supra*). Wolverine declined to notify Ragsdale that she was on FMLA leave precisely because they insisted that she was neither on such leave nor entitled to the ancillary FMLA rights. Nothing in the language of the FMLA required, or necessarily permitted, treating such a period of company-sponsored leave as FMLA leave.

III. THE REGULATIONS AT ISSUE IN THIS CASE ARE REASONABLE

Sections 825.208(c) and 825.700(a) provide that company-sponsored leave will not be counted against an employee's FMLA entitlement unless the employer has designated that company-sponsored leave as also being FMLA leave and has so notified the employee. Respondent argues that this provision constitutes a "penalty" imposed on employers as a sanction for violating the designation and notice requirements of section 825.208(a). Respondent objects that the only penalty expressly authorized by the statute itself is the $100 sanction for violations of the poster requirement of section 2619. (R.Br. 5-6, 30-32).

The manifest purpose of section 825.700(a), however, is not to punish employers, but to assure that employees do not lose their FMLA rights, or a meaningful opportunity to exercise them, because of an employer's failure to comply with section 825.208(a). There are numerous other provisions of the FMLA regulations which, like section 825.700(a), adversely alter a party's legal rights because it has failed to provide certain information or

notice. If section 825.700(a) constitutes a legally impermissible "penalty," these other provisions would also be invalid. Most of these similar provisions benefit employers by limiting the rights of employees who have failed to provide notice or information to their employers.

An employee who does not give an employer information needed to establish FMLA eligibility can be denied FMLA leave, even though he or she is in fact eligible.[15] 29 C.F.R. § 825.208(a)(1). An employee who does not accord an employer advance notice of a foreseeable leave can be required to await an additional thirty days before beginning that leave. 29 C.F.R. § 825.304(b); see 29 C.F.R. § 825.601(b).[16] Employees who do not provide advance notice of their intent to return to work can be forced to remain on leave for an additional two days. 29 C.F.R. §§ 825.310(e), 825.312(e). An employee who at the end of a twelve-week leave period is still too ill to return to work ordinarily need not reimburse the employer for health benefit premiums paid by the employer during the leave; if, however, the worker fails within thirty days to provide the employer with a requested medical certification of continued incapacity, the worker will be liable for those costs. 29 C.F.R. § 825.213(a)(3). Similarly, the regulations provide that an employer which has failed to notify a worker of some

[15] In many circumstances the FMLA itself does not require the employee to provide such information. See n. 1, *supra*.

[16] Although section 2612(e) requires an employee to provide such advance notice, it does not by its terms permit an employer to delay leave because the worker has not done so.

employee obligation under the FMLA cannot complain if the employee fails to meet that obligation.[17] All of these regulations are reasonably framed "to carry out" the FMLA. 29 U.S.C. § 2654.

Respondent appears to suggest that it would be difficult for an employer to comply with the requirement of section 825.208(a) that it notify an employee that it has designated leave as FMLA leave. Such notification, however, could be provided in a single sentence. Several years before this action arose, the Secretary published a proposed form for use by employers in responding to leave requests. (Form WH-381, 29 C.F.R. pt. 825 App. D; Brief Appendix). An employer using this form can provide notification simply by checking a box on numbered statement 2. (See Brief App. 2). At least for a large employer like Wolverine Worldwide,[18] both the requirements of the federal regulations and the possible use of this officially approved form should have been readily apparent.

Finally, respondent suggests that employers will be deterred from according to employees more than twelve weeks of company-sponsored leave because of the risk that they will have to provide at the end of the company-sponsored leave an additional twelve weeks of FMLA leave. (R.Br. 4, 28). Such a risk, however, could be realized only if an employer, ignorant of the requirements of section 825.208(a)(1), failed to provide the requisite

[17] 29 C.F.R. §§ 825.300(a), 825.301(f), 825.304(i), 825.305(a), 825.310(e).

[18] See http://www.wolverineworldwide.com (company has 4,000 employees and annual sales of $700 million).

notice. But any employer concerned that ignorance of section 825.208(a)(1) might lead to consecutive leaves would *by definition* know what that very section requires. It is difficult to understand why such an informed employer would be concerned that failure of notification might occur. Any employer can definitively assure that company-sponsored and FMLA leave will run concurrently simply by providing notice using form WH-381 or by including a single sentence in any company-framed notice. Because the overwhelming majority of leaves taken under the FMLA are quite short,[19] it is exceedingly unlikely that any employer would actually be concerned about the hypothetical problem posited by respondent.[20]

---

[19] D. Cantor, et al. & U.S. Dep't of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* 2-3 (Jan. 2001) (median FMLA leave is 10 days).

[20] In the instant case, respondent itself decided to provide seven months of unpaid sick leave despite the existence of the regulations in question.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX D TO PART 825 – PROTOTYPE
NOTICE: EMPLOYER RESPONSE TO EMPLOYEE REQUEST FOR FAMILY AND MEDICAL LEAVE (FORM WH-381)

Employer Response to Employee Request for Family or Medical Leave
(Optional use form – see 29 CFR §825.301(c))

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

(Family and Medical Leave Act of 1993)

(Date)

TO: _____
(Employee's name)

FROM: _____
(Name of appropriate employer representative)

SUBJECT: Request for Family/Medical Leave

On _____ (*date*), you notified us of your need to take family/medical leave due to:

[ ] the birth of your child, or the placement of a child with you for adoption or foster care; or

[ ] a serious health condition that makes you unable to perform the essential functions of your job; or

[ ] a serious health condition affecting your [ ] spouse, [ ] child, [ ] parent, for which you are needed to provide care.

You notified us that you need this leave beginning on _____ (*date*) and that you expect leave to continue until on or about _____ (*date*).

Except as explained below, you have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month

period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (*check appropriate boxes; explain where indicated*)

1. You are [ ] eligible [ ] not eligible for leave under the FMLA.

2. The requested leave [ ] will [ ] will not be counted against your annual FMLA leave entitlement.

3. You [ ] will [ ] will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by _____ (*insert date*) (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We [ ] will [ ] will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used the following conditions will apply: (*Explain*)

5 (a) If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you and it is agreed that you will make premium payments as follows: (*Set forth dates, e.g., the 10th of each month, or pay periods, etc. that specifically cover the agreement with the employee.*)

(b). You have a minimum 30-day (*or, indicate longer period, if applicable*) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, *provided* we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work. We [ ] will [ ] will not pay your share of health insurance premiums while you are on leave.

(c). We [ ] will [ ] will not do the same with other benefits (e.g., life insurance, disability insurance, etc.) while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you [ ] will [ ] will not be expected to reimburse us for the payments made on your behalf.

6. You [ ] will [ ] will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until the certification is provided.

7 (a). You [ ] are [ ] are not a "key employee" as described in §825.218 of the FMLA regulations. If you are a "key employee," restoration to employment may be denied following FMLA leave on the

grounds that such restoration will cause substantial and grievous economic injury to us.

(b). We [ ] have [ ] have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. (*Explain (a) and/or (b) below. See §825.219 of the FMLA regulations.*)

8. While on leave, [ ] will [ ] will not be required to furnish us with periodic reports every ___ (*indicate interval of periodic reports, as appropriate for the particular leave situation)* of your status and intent to return to work (*see §825.309 of the FMLA regulations).* If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you [ ] will [ ] will not be required to notify us at least two work days prior to the date you intend to report for work.

9. You [ ] will [ ] will not be required to furnish recertification relating to a serious health condition. (*Explain below, if necessary, including the interval between certifications as prescribed in §825.308 of the FMLA regulations.*)

Form WH-381
December 1994

September 7, 2001

Supreme Court, U.S.
SEP 7 2001

No. 00-6029

In the Supreme Court of the United States

TRACY RAGSDALE, ET AL., PETITIONERS

v.

WOLVERINE WORLDWIDE, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Family and Medical Leave Act of 1993 (FMLA or Act) requires covered employers to provide eligible employees with "a total of 12 workweeks of leave during any 12-month period" for specified reasons, 29 U.S.C. 2612(a)(1), including leave needed "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee," 29 U.S.C. 2612(a)(1)(D). The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. 2654. The question presented is as follows:

Whether the Secretary has acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the Act's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, authorizes the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the provisions of the Act. 29 U.S.C. 2654. The court of appeals held that a regulation adopted by the Secretary pursuant to that statutory grant of authority was invalid as applied in this case. The United States therefore has an interest in the question presented. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. The Family and Medical Leave Act (FMLA) provides that

an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period * * *

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. 2612(a)(1)(D). The Act confers an equivalent right on any eligible employee who wishes to take leave in order to care for a newborn or newly adopted child, or for a close relative with a serious health condition. 29 U.S.C. 2612(a)(1)(A)-(C). The term "eligible employee" is defined to mean an employee who, *inter alia*, "has been employed * * * for at least 12 months by the employer with respect to whom leave is requested." 29 U.S.C. 2611(2)(A)(i). The FMLA applies to employers "who employ[] 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. 2611(4)(A)(i).

An employer may comply with its obligations under the FMLA by providing unpaid leave. 29 U.S.C. 2612(c). The Act provides, however, that "[a]n eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under [29 U.S.C. 2612(a)(1)(C) or (D)] for any part of the 12-week period of such leave under such subsection." 29 U.S.C. 2612(d)(2)(B). The Act expressly preserves and encourages more generous leave policies, both those voluntarily adopted by employers and those mandated by state law. 29 U.S.C. 2651-2653.

The FMLA requires employees to give their employers advance notice of foreseeable leave, 29 U.S.C.

2612(e), and it allows employers to require medical certification when leave is sought for a serious health condition, 29 U.S.C. 2613. With certain exceptions, the Act entitles employees to job restoration in the same or an equivalent position upon their return from leave, and it requires employers to maintain employees' group health benefits during the leave period. 29 U.S.C. 2614(a) and (c). It is "unlawful for any employer to interfere with, restrain, or deny the exercise" or attempted exercise of any right provided under the Act. 29 U.S.C. 2615(a)(1). Either the affected employee or the Secretary of Labor may bring suit to enforce the Act. 29 U.S.C. 2617 (1994 & Supp. V 1999). Employers are required to post a notice of FMLA rights in a form approved by the Secretary. 29 U.S.C. 2619(a); see 29 C.F.R. 825.300(a). The Secretary has prepared a prototype notice for that purpose, which is reprinted in Appendix C to Part 825 of 29 C.F.R., and which is also available from local offices of the Wage and Hour Division of the Department of Labor (DOL).

b. The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the provisions of the Act. 29 U.S.C. 2654. Pursuant to that authority, the Secretary has promulgated detailed regulations concerning the process by which employers and employees are to communicate with each other regarding FMLA leave. See 29 C.F.R. 825.207(d)(1), 825.208, 825.300-825.312, 825.700(a). Those regulations impose notice requirements on both employees and employers. For example, the regulations specify the circumstances under which an employee must give 30-days' advance notice of foreseeable leave, 29 C.F.R. 825.302, and the recourse available to employers if such notice is not provided, 29 C.F.R. 825.304. Certain regulations detail the process by which an

employer may require an employee to provide medical certification of a serious health condition, 29 C.F.R. 825.305-825.308, and of the employee's fitness to return to work, 29 C.F.R. 825.310; and others spell out the permissible consequences of an employee's failure to provide such certifications, 29 C.F.R. 825.311-825.312. See also 29 C.F.R. 825.301(a) (requiring that written employer guidance to employees, such as employee handbooks, must include information regarding the FMLA).

The regulations further require the employer to communicate to the employee specified information regarding the employee's rights and responsibilities under the Act at the time he requests leave for an FMLA-covered reason. 29 C.F.R. 825.301(b). The written notice must state "that the leave will be counted against the employee's annual FMLA leave entitlement." 29 C.F.R. 825.301(b)(1)(i). The notice must also inform the employee of, *inter alia*, "the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution," 29 C.F.R. 825.301(b)(1)(iii); "any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments," 29 C.F.R. 825.301(b)(1)(iv); and "the employee's right to restoration to the same or an equivalent job upon return from leave," 29 C.F.R. 825.301(b)(1)(vii). The required written notice "must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave." 29 C.F.R. 825.301(c). A prototype notice is contained in Appendix D to Part 825 of 29 C.F.R., and is also available from local offices of the DOL's Wage and Hour Division. See 29 C.F.R. 825.301(b)(2).

Other regulatory provisions require employers to notify employees that particular periods of leave are covered by the FMLA, and specify the consequences that follow when such notice is not given. The regulations provide that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided" in Section 825.208 of the regulations. 29 C.F.R. 825.208(a). "The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing," but if it is oral, it must be confirmed in writing by the following payday. 29 C.F.R. 825.208(b)(2). Under Section 825.208, "[o]nce the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 C.F.R. 825.208(b)(1).[1] Another regulation, which applies to both paid and unpaid leave, states that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. 825.700(a).

2. a. On March 17, 1995, petitioner Tracy Ragsdale began her employment with respondent Wolverine Worldwide, Inc. Pet. App. A2. Petitioner was diagnosed with cancer in February 1996, and on February

[1] Although paragraph (b)(1) of Section 825.208 refers by its terms to designation of "paid leave," the first sentence of Section 825.208(a) makes clear that the notice obligations "provided in this section" apply to designations of "paid or unpaid" leave. 29 C.F.R. 825.208(a) and (b)(1).

21, 1996, she requested and received medical leave. *Ibid.* Respondent's leave policy allowed employees with at least six months of service to take leave for up to seven months, on the condition that the employee submit a request for extension of leave every 30 days. *Ibid.* Although the opinions below do not directly address the point, it appears that petitioner's leave was unpaid. See U.S. Br. Pet. Stage 5-6. In addition to petitioner's initial request for leave, respondent granted six 30-day extensions of leave, the last coming on August 15, 1996. *Ibid.* During that period, respondent did not notify petitioner of her eligibility for leave under the FMLA, and it did not designate petitioner's leave as FMLA leave. *Ibid.* Respondent states in this Court that it was aware of the Act but believed that petitioner was not eligible for FMLA leave because she had not worked for respondent a full 12 months at the time her leave initially commenced. Br. in Opp. 2 n.1.

On September 20, 1996, petitioner was terminated because she had exhausted her seven months of leave under the company policy and was unable to return to work. Pet. App. A2. On September 26, 1996, petitioner requested additional FMLA leave or, in the alternative, permission to return to work on a reduced hour schedule. *Id.* at A3. Respondent denied both requests. *Ibid.* Petitioner's physician released her to work in December 1996, and she has been employed in full-time positions elsewhere since December 31, 1996. *Ibid.* The parties appear to have litigated this case on the assumption that petitioner could have returned to work at the expiration of seven months of company leave plus 12 weeks of FMLA leave, had respondent permitted those periods of leave to run sequentially.

b. Petitioner brought suit against respondent, asserting claims under, *inter alia*, the FMLA. Pet. App.

B2. The district court granted respondent's motion for summary judgment on the FMLA claim. *Id.* at B4-B9. The court held that petitioner was eligible for FMLA leave as of March 18, 1996, the date on which she requested her first extension of leave, even though she was not eligible on February 21, 1996, when she first took leave, because she had not yet completed 12 months of employment with respondent. *Id.* at B4-B6. The court further held, however, that petitioner was not entitled to 12 weeks of FMLA leave in addition to the seven months of leave she had already received. The court acknowledged that under the DOL regulations, respondent's failure to designate petitioner's leave as FMLA leave would preclude respondent from counting that leave against the statutory 12-week entitlement. *Id.* at B6-B7. The court concluded, however, that the DOL regulations were invalid because they "added requirements which not only go beyond those of the statute, but which are inconsistent with the stated purpose of the statute and which would grant entitlements which were not given by Congress." *Id.* at B8 (quoting *Cox* v. *AutoZone, Inc.*, 990 F. Supp. 1369, 1381 (M.D. Ala. 1998), aff'd *sub nom. McGregor* v. *AutoZone, Inc.*, 180 F.3d 1305 (11th Cir. 1999)).

c. The court of appeals affirmed. Pet. App. A1-A12. The court concluded that "the DOL's regulations improperly 'convert[] the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave.'" *Id.* at A7 (quoting *McGregor* v. *AutoZone, Inc.*, 180 F.3d at 1308). Because the "terms of the statute contemplate only that the employer will be required to provide a 'total' of twelve weeks of unpaid leave," the court stated, "twelve weeks

of leave is both the minimum the employer must provide and the maximum that the statute requires." *Ibid.*

The court of appeals also believed that notice requirements imposed by other provisions of the FMLA "strongly support the view that where Congress desired explicit notice provisions with significant consequences for their violation, it provided for them in the text of the statute." Pet. App. A9 (citing 29 U.S.C. 2612(e)(1), 2614(b)(1)(A)-(B), 2619). The court relied as well on portions of the legislative history stating that the FMLA was designed to establish a minimum standard for leave, and indicating that the 12-week leave period was a compromise between the family needs of workers and the business needs of employers. *Id.* at A9-A10. The court concluded that "[t]he DOL regulations must be struck down" because they "create rights which the statute clearly does not confer." *Id.* at A10.

At the same time, the court of appeals recognized that situations could arise "in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights." Pet. App. A10. As an example, the court pointed out that "notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks." *Id.* at A10-A11 (citing *Longstreth* v. *Copple*, 189 F.R.D. 401 (N.D. Iowa 1999)). In the instant case, however, where respondent's leave program was "far more generous than the baseline established by the FMLA," and petitioner's "medical condition rendered her unable to work for substantially longer than the FMLA twelve-week period," the court

of appeals concluded that applying the notice regulations would "directly contradict the statute by increasing the amount of leave that an employer must provide." *Id.* at A11. On that basis, the court held that 29 C.F.R. 825.700(a) is "invalid insofar as it purports to require an employer to provide more than twelve weeks of leave time." Pet. App. A11.

SUMMARY OF ARGUMENT

Pursuant to a broad statutory grant of rulemaking authority, the Secretary of Labor has promulgated extensive regulations implementing the FMLA. *Inter alia*, those regulations (1) require the employer to determine and notify the employee in advance that a particular period of leave will be treated as FMLA leave, and (2) provide (with certain exceptions) that the employee's absence may not be counted against the 12-week FMLA entitlement until the required notice has been provided. Those regulations constitute a reasonable and lawful exercise of the agency's rulemaking authority.

I. In addition to protecting a covered worker's interests in continued employment after the expiration of the leave period, the FMLA enables the worker, at the outset of leave, to plan his medical treatment or caregiving activities with a degree of confidence that an employer's unilateral leave policy could not provide. The Secretary reasonably determined that full achievement of that statutory purpose requires that the employee be made aware at the outset of the statutory leave period of his rights and responsibilities under the Act. The regulations at issue in this case complement other regulatory provisions intended to provide employees covered by the FMLA with adequate information concerning the Act's terms.

Under the regulations, an employer is required to post on its premises a general notice that provides a succinct overview of the FMLA's requirements and prohibitions. The employer is also required to provide a more comprehensive and specific notice at the time that an employee requests leave for an FMLA-covered reason. The requirement that an employer must determine and inform the employee in advance that a particular leave period will be treated as FMLA leave is thus part of a larger regulatory effort to make the FMLA's protections meaningful by increasing employee understanding of the Act's provisions. That requirement imposes no onerous burden on the employer, which must in any event make its own internal determination whether particular leave periods will be treated as FMLA leave.

The Secretary's regulations also specify the consequence of non-compliance with the underlying designation and notice requirements. The regulations provide that particular periods of leave will not be counted against an employee's annual 12-week entitlement under the FMLA if the employer fails to give timely notice that the leave will be so treated. That approach reflects the Secretary's reasonable determination that the predictability and ease of administration of a categorical rule make it preferable to a regime in which an individual's entitlement to relief under the Act would turn on a potentially difficult retrospective inquiry into what steps the employee might have taken had he received timely notice. The Secretary's decision to adopt a prophylactic rule, rather than to mandate a case-specific determination whether an employee was prejudiced by his failure to receive the required notice, is a permissible exercise of administrative discretion.

II. The Secretary's approach is not inconsistent with Congress's decision to mandate only 12 weeks of leave under the FMLA. The FMLA authorizes the Secretary to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. 2654. Under this Court's precedents, the Secretary, acting pursuant to that grant of rulemaking authority, may impose requirements that go beyond those contained in the Act itself.

Contrary to the court of appeals' assertion, nothing in the Secretary's regulations requires any employer to allow any employee to take more than 12 weeks of leave for an FMLA-covered reason. An employer may always (so far as the FMLA and the DOL's implementing regulations are concerned) limit an employee's leave to the 12 weeks specified by the Act, and may dismiss an employee who is unable to return to work after 12 weeks of leave, so long as the employer provides timely notice that a particular period will be counted as FMLA leave.

The FMLA states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter [29 U.S.C. 2611-2619]." 29 U.S.C. 2615(a)(1). That language closely resembles Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), which has been broadly construed to prohibit employer conduct that deters employees' participation in protected activities. The Secretary has reasonably concluded that an employee's informed exercise of rights under the FMLA requires prior notice that particular periods of leave will be counted against the worker's 12-week statutory entitlement. An employer that fails to provide the requisite notice that particular periods will be counted as FMLA leave, and then dismisses a worker based on his health-related inability to

perform the functions of the job, may properly be said to "interfere with" or "restrain" the employee's exercise of his rights under the Act, even if the employee receives 12 weeks of leave. That is particularly so in light of the fact that the Act does not specify how employers and employees must communicate about the relationship between FMLA and other leave.

The court of appeals itself stated that notice regarding the commencement of FMLA leave might be necessary in cases where the employee could show prejudice from the employer's failure to inform him that a particular period of leave would be counted against the 12-week FMLA entitlement. The court's decision thus ultimately rests on the fact that the Secretary has chosen to promulgate a categorical rule. Given the breadth of the Secretary's rulemaking authority, however, and the evident desirability of avoiding difficult retrospective inquiries into the effect of lack of notice in individual cases, the Secretary acted reasonably by adopting the rule in question.

ARGUMENT

THE SECRETARY'S REGULATIONS CONCERNING AN EMPLOYER'S DESIGNATION OF LEAVE CONSTITUTE A REASONABLE IMPLEMENTATION OF THE FAMILY AND MEDICAL LEAVE ACT

"Where the empowering provision of a statute states simply that the agency may 'make . . . such rules * * * as may be necessary to carry out the provisions of this Act,' * * * the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation and footnote omitted). The FMLA vests the Secretary of Labor with broad

authority to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. 2654. In light of Congress's express conferral of legislative rulemaking authority, a court must uphold the validity of the Secretary's FMLA regulations unless they are "arbitrary, capricious, or manifestly contrary to the statute." *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). Accord *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001) ("When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency * * *,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.") (citations omitted); cf. *Batterton* v. *Francis*, 432 U.S. 416, 426 (1977) (a legislative rule "can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'") (citing Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A) and (C)).

This case implicates two distinct (though related) aspects of the Secretary's regulatory scheme. First, the regulations require the employer to notify the employee, at the time leave is requested for an FMLA-covered reason, that the leave will count against the worker's 12-week entitlement under the Act. See 29 C.F.R. 825.208(a) and (b), 825.301(b)(1)(i). Second, the regulations specify the consequence of the employer's failure to comply with the notice requirement: namely, that until the required notice is provided, the employee's absence may not be counted against the 12-week FMLA entitlement. See 29 C.F.R. 825.208(c) (paid leave), 825.700(a) (paid and unpaid leave). The

court of appeals did not specifically address the legality of the underlying notice requirement. The court held, however, that Section 825.700(a) is "invalid insofar as it purports to require an employer to provide more than twelve weeks of leave time." Pet. App. A11.

The court of appeals erred in holding 29 C.F.R. 825.700(a) to be invalid as applied in this case. First, the pertinent regulatory provisions are "reasonably related to the purposes of the enabling legislation," *Mourning*, 411 U.S. at 369, because they assist employees covered by the FMLA in making informed choices concerning the exercise of their statutory rights, while imposing no substantial burden on covered employers. Second, the regulations are not contrary to the terms of the FMLA because the Secretary is authorized to prescribe requirements that go beyond those imposed by the Act itself; because the regulations do not require any employer to provide any employee with more than 12 weeks of leave; and because no provision of the FMLA defines the consequences of an employer's failure to provide notice that particular periods of leave will count against the Act's 12-week entitlement.

I. THE REGULATION AT ISSUE IN THIS CASE IS REASONABLY RELATED TO THE PURPOSES OF THE ACT

A. The FMLA reflects Congress's determination that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. 2601(a)(4); see also 29 U.S.C. 2601(a)(3) ("the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting"). To address those problems, the Act "entitle[s] employees to take reasonable leave for medical

reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. 2601(b)(2).

The protections of the FMLA may have substantial value even in the typical workplace where the employer chooses, as a matter of policy, to allow employees to be absent from work in order to perform parental or other care-giving functions, or because the employee's medical condition renders him unable to perform the functions of the job. The 12-week leave entitlement established by the Act, for example, may be greater than the amount of leave that the employer is otherwise willing to provide. The FMLA also requires the employer to maintain the employee's health benefits in effect during the pendency of FMLA leave "at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave." 29 U.S.C. 2614(c)(1). Perhaps most significantly, the Act affords the worker a *legally enforceable* right, not dependent upon the grace of the employer, to restoration in the same or an equivalent position upon his return from FMLA leave. 29 U.S.C. 2614(a)(1).[2]

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[2] The legislative history reflects Congress's awareness and concern that employees may take leave for family or medical reasons, based on an apparent understanding with the employer that their jobs will be protected, only to be dismissed from employment after acting in reliance on that understanding. See S. Rep. No. 3, 103d Cong., 1st Sess. 8-10 (1993); H.R. Rep. No. 8, 103d Cong., 1st Sess. Pt. 1, at 24 (1993). Those examples reinforce the common-sense proposition that an employer's stated policy of permitting workers to take leave for specified reasons is not the practical equivalent of a legally enforceable guarantee of continued employment at the conclusion of the leave period. Even where the employer has made a contractual or similar binding commitment that the use of leave for specified reasons will not result in loss of employment, the

The guarantee of continued employment provided by the FMLA enables the worker, at the outset of leave, to plan his medical treatment or care-giving activities with a degree of confidence that an employer's unilateral policy could not provide. See H.R. Rep. No. 8, 103d Cong., 1st Sess. Pt. 1, at 41 (1993) ("employees would be greatly deterred from taking leave without the assurance that upon return from leave, they will be reinstated to a genuinely equivalent position"). Thus, the value of the FMLA's reinstatement requirement is not simply that it protects workers from job loss when family or medical circumstances make absence from work absolutely unavoidable. That requirement also affords employees a degree of flexibility and assurance in planning medical treatment and care-giving activities *before* leave commences and in balancing employment obligations against competing responsibilities.[3]

FMLA's remedial mechanisms—which include equitable relief and attorney's fees in private suits, see 29 U.S.C. 2617(a)(1)(B) and (3), as well as enforcement proceedings brought by the Secretary, see 29 U.S.C. 2617(b)—may be more efficacious than those available under other sources of law.

[3] The FMLA's potential to facilitate employee planning, and the consequent need for accurate information concerning the Act's provisions, may be greatest when leave is taken to care for a newborn or newly adopted child, or for a close relative with a serious health condition. See 29 U.S.C. 2612(a)(1)(A)-(C). An employee who requests leave for one of those purposes may have a greater practical ability to control the timing and duration of his absence from work than will an employee who requests leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1)(D). Even an employee who requests leave for a "serious health condition," however, may be able to make effective use of information concerning his rights and responsibilities under the Act. For example, "[a]n employee who must be absent from work

B. The regulations implicated by this case—29 C.F.R. 825.208(a) and (b), 825.301(b)(1)(i), and 825.700(a)—further that statutory purpose and complement other regulatory provisions intended to provide employees covered by the FMLA with adequate information concerning their rights and responsibilities under the Act. "Every employer covered by the FMLA is required to post and keep posted on its premises * * * a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act." 29 C.F.R. 825.300(a); see p. 3, *supra*. The prototype notice prepared by the DOL is cast in general terms and provides a succinct overview of the FMLA's requirements and prohibitions. See 29 C.F.R. Pt. 825, App. C.

Under the regulations, an employer is required to provide an additional notice—notice that is both more comprehensive and more tailored to the circumstances of the individual worker—at the time that an employee requests leave for an FMLA-covered purpose. See 29 C.F.R. 825.301(b) and (c); 29 C.F.R. Pt. 825, App. D. That regulatory mandate reflects the Secretary's determination that the FMLA's purposes cannot adequately be realized if workers are unaware of their rights and responsibilities under the Act. See 60 Fed. Reg. 2220 (1995) ("The intent of this notice requirement is to insure employees receive the information necessary to enable them to take FMLA leave."). Recent empirical studies indicate that most employees know too little

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to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment." 29 C.F.R. 825.115. A worker may be able to adjust his treatment schedule, in light of information concerning the provisions of the FMLA, in order to protect his rights under the Act.

about the FMLA to be able to take advantage of its protections on their own. Surveys of randomly-selected employees in FMLA-covered establishments in 1995 and 2000 showed that only 59% of those employees had even heard of the Act, a percentage that did not increase between 1995 and 2000. D. Cantor et al. & U.S. Dep't of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* 3-10 (Jan. 2001). Similarly, a recent survey of human resources professionals suggested that only 29% of employees and 31% of line managers and supervisors understand the FMLA. Society for Human Resource Management, *2000 FMLA Survey* (Jan. 2001).

The Secretary's regulations sensibly require that employees who have actually requested leave for an FMLA-covered reason—and who are therefore in immediate need of information regarding the Act's provisions and its applicability to their individual circumstances—must receive more detailed and specific notice concerning the Act than the employer is required to post for the work force generally. Because employers typically provide some form of parental, sick, and disability leave, an employee's request for leave for an FMLA-covered reason does not by itself evidence familiarity with the terms of the Act and implementing regulations.[4] An understanding of the Act's provisions

[4] The DOL regulations make clear that an employee will be treated as having requested FMLA leave (thereby triggering the notice provisions of 29 C.F.R. 825.301) if he requests leave for an FMLA-covered *reason*. 29 C.F.R. 825.302(c), 825.303(b). "The employee need not expressly assert rights under the FMLA or even mention the FMLA." 29 C.F.R. 825.302(c) and 825.303(b). Thus, the request for leave will not necessarily reflect the employee's awareness that the FMLA exists, let alone a sufficient understanding of the worker's rights and responsibilities under the Act.

therefore will substantially assist the worker, who may have rights under the Act that go beyond the terms of the employer's own leave policy.

As a practical matter, an employee's full understanding of his rights and responsibilities under the FMLA requires an awareness that a particular period of leave will be counted against his 12-week annual entitlement under the Act. Notice that the employer regards a particular period as FMLA leave may also assist the worker in monitoring the employer's compliance with the substantive provisions of the Act (*e.g.*, the requirement that the employer maintain health benefits in effect during the pendency of the leave period, see 29 U.S.C. 2614(c)(1)). The designation and notice requirement contained in 29 C.F.R. 825.208(a) and (b) and 825.301(b)(1)(i)—*i.e.*, the requirement that an employer must determine and inform the employee in advance that a particular leave period will be treated as FMLA leave—is therefore properly understood as part of a larger regulatory framework designed to make the FMLA's protections meaningful by increasing employee understanding of the Act's provisions and avoiding the confusion that can lead to loss of substantive rights.

The leave designation requirement imposes no onerous burden on the employer. In order to ensure compliance with the Act, the employer must in any event make its own internal determination whether particular leave periods will be treated as FMLA leave, with concomitant employee rights to job restoration and continuation of health benefits. See 29 U.S.C. 2614(a)(1) and (c)(1). Sections 825.208(a) and (b) and 825.301(b)(1)(i) simply direct the employer to make its FMLA leave determination at the outset of the leave period (to the extent that is feasible) and to communi-

cate that determination promptly to the affected employee.

The FMLA applies only to relatively large employers —*i.e.*, those "who employ[] 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. 2611(4)(A)(i). Such employers can be expected to deal on a regular basis with requests for leave for FMLA-covered reasons. Placing the principal responsibility for disseminating relevant information on the employer, rather than leaving to each employee the task of informing himself about the Act's provisions, is especially reasonable with respect to that category of employers.

C. The Secretary's regulations also specify the consequence of an employer's non-compliance with the designation requirement. The regulations provide, as a categorical matter, that particular periods of leave will not be counted against an employee's annual 12-week entitlement under the FMLA if the employer fails to give timely notice that the leave will be so treated. See 29 C.F.R. 825.208(c) (paid leave), 825.700(a) (paid and unpaid leave). That prophylactic rule will sometimes place the employee in a better position than if the employer had provided the required notice in a timely fashion. In the instant case, for example, the effect of 29 C.F.R. 825.700(a) is to afford petitioner a viable cause of action under the FMLA, even though she would have been physically unable to return to work within 12 weeks of her initial eligibility for FMLA leave if respondent had promptly informed her at that time that her leave would be counted against the FMLA limit.

The Secretary reasonably determined, however, that the predictability and ease of administration of a categorical rule make it preferable to a regime in which an individual's entitlement to relief under the Act would turn on a potentially difficult retrospective inquiry into what steps the employee might have taken had he received timely notice. As the agency explained when it promulgated the final rule, the pertinent regulatory provisions were "intended to resolve the question of FMLA designation as early as possible in the leave request process, to eliminate protracted 'after the fact' disputes." 60 Fed. Reg. at 2207. The Secretary's approach reflects a permissible exercise of administrative discretion. Compare *Mourning*, 411 U.S. at 371-372 ("where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority").

II. THE COURT OF APPEALS ERRED IN HOLDING THAT 29 C.F.R. 825.700(a) IS INCONSISTENT WITH CONGRESS'S DECISION TO MANDATE ONLY 12 WEEKS OF FMLA LEAVE

The court of appeals concluded that 29 C.F.R. 825.700(a) is "contrary to clear congressional intent," Pet. App. A10 (quoting *Chevron*, 467 U.S. at 843 n.9), "insofar as it purports to require an employer to provide more than twelve weeks of leave time," *id.* at A11. The court observed that "[t]he FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires." *Id.* at A7. The court of appeals found Section 825.700(a) to be inconsistent with the balance struck by Congress

between the interests of employees and employers. *Id.* at A10. That analysis is misconceived.

A. The FMLA authorizes the Secretary to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. 2654. An agency vested with such broad rulemaking authority may "require[] some individuals to submit to regulation who do not participate in the conduct the legislation was intended to deter or control," in order to provide "a reasonable margin to insure effective enforcement." *Mourning*, 411 U.S. at 374 (citation omitted). Accord *O'Hagan*, 521 U.S. at 672-673 ("[a] prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited"); *id.* at 673 (pursuant to statutory grant of rulemaking authority, "the [Securities and Exchange] Commission may prohibit acts not themselves fraudulent * * * if the prohibition is 'reasonably designed to prevent . . . acts and practices [that] are fraudulent'") (quoting 15 U.S.C. 78n(e)); *id.* at 674 (noting with apparent approval that the Commission defended the challenged rule "as a means necessary and proper to assure the efficacy of [statutory] protections"); *Clifton* v. *FEC*, 114 F.3d 1309, 1312 (1st Cir. 1997) ("Agencies often are allowed through rulemaking to regulate beyond the express substantive directives of the statute, so long as the statute is not contradicted.") (citing *Mourning*), cert. denied, 522 U.S. 1108 (1998).

In *Mourning*, the Court addressed the contention that a rule promulgated by the Federal Reserve Board was "'inconsistent' with portions of the enabling statute [the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*] * * * because the statute specifically mentions disclosure only in regard to transactions in which a finance charge is in fact imposed, although the rule requires disclosure

in some cases in which no such charge exists." 411 U.S. at 372 (footnote omitted). The creditor in that case "argue[d] that, in requiring disclosure as to some transactions, Congress intended to preclude the Board from imposing similar requirements as to any other transactions." *Ibid.* The Court squarely rejected that contention, explaining that "[t]o accept [the creditor's] argument would undermine the flexibility sought in vesting broad rulemaking authority in an administrative agency." *Ibid.*; see *id.* at 373; see also *Texas Rural Legal Aid Inc.* v. *Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) ("a congressional decision to prohibit certain activities does *not* imply an intent to disable the relevant administrative body from taking similar action with respect to activities that pose a similar danger") (citing *Mourning*); cf. *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 262 (1945) ("Congress by stating expressly its primary ends does not deny resort to the means necessary to achieve them."). Similarly here, so long as the Secretary has employed "a means necessary and proper to assure the efficacy of [statutory] protections," *O'Hagan*, 521 U.S. at 674, the regulations are valid, notwithstanding the fact that they impose obligations beyond those contained in the FMLA itself. See *Plant* v. *Morton Int'l, Inc.*, 212 F.3d 929, 935-936 (6th Cir. 2000).[5]

B. The court of appeals held that 29 C.F.R. 825.700(a) is "invalid insofar as it purports to require an employer to provide more than twelve weeks of leave time." Pet. App. A11. Nothing in the DOL regulations,

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[5] The Court's analysis in *Mourning* also refutes the court of appeals' suggestion (see Pet. App. A9) that the inclusion in the FMLA of express notice requirements implicitly divests the Secretary of the authority to require notice in other circumstances.

however, requires any employer to allow any employee to take more than 12 weeks of leave for an FMLA-covered purpose. Nor do the regulations make such a requirement a necessary or even likely consequence of an employer's decision to adopt its own leave program. To limit an employee's leave to the 12 weeks specified by the Act, an employer need only provide timely notice that a particular period will be counted as FMLA leave. The DOL rules therefore do not *prohibit* an employer from dismissing an employee who is unable to return to work after 12 weeks of leave; they simply establish reasonable preconditions for the employer's exercise of that prerogative. Absent any reason to believe that compliance with the notice requirement will be difficult or onerous—and the court of appeals offered none—the court erred in concluding that the Secretary's regulatory approach would subvert the balance struck by Congress.[6]

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[6] An agency authorized to adjudicate claims of statutory violations, and to devise a suitable administrative process for resolving such disputes, may require that claims be presented to the agency within a specified time after the alleged violation occurs. See, *e.g.*, 29 C.F.R. 1614.105(a)(1) and 1614.106(b) (Equal Employment Opportunity Commission regulations establishing time limits within which federal employees must contact an agency EEO counselor and file a formal complaint in order to preserve claims under Title VII); *Rennie* v. *Garrett*, 896 F.2d 1057, 1059 (7th Cir. 1990) (discussing predecessor regulations governing same subjects). The agency's adoption of a reasonable limitations period does not negate the claimant's statutory entitlement to relief, even though a person who fails to pursue his claim within the designated period may be denied a remedy notwithstanding the existence of a statutory violation. Similarly here, the legal impediment to respondent's dismissal of petitioner in September 1996 is the direct result of respondent's own failure to preserve its rights in the manner specified by the regulations.

Nor is there merit to the court of appeals' suggestion (Pet. App. A9, A11) that Section 825.700(a) is invalid because it imposes "a disproportionate penalty" for a "technical violation of the designation regulations." Relatively minor violations of timing and notice requirements often entail severe consequences, as where a plaintiff with a meritorious claim files suit one day after the statute of limitations expires. See *United States* v. *Locke*, 471 U.S. 84, 101 (1985) ("Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced."). If enforcement of a timing or notice requirement promotes the effective administration of the relevant statute in cases where the rule is obeyed, and if compliance is neither onerous nor difficult, such requirements are reasonable. The same principle applies here. In any event, the consequence of a failure to afford the required notice is neither "disproportionate" nor a "penalty." The employer suffers no permanent disadvantage; the result is simply to postpone the running of the 12-week period of leave mandated by the FMLA until the employer gives the notice required to commence that period.

C. The FMLA states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter [29 U.S.C. 2611-2619]." 29 U.S.C. 2615(a)(1); see 29 C.F.R. 825.220(b) ("Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act."). The language of 29 U.S.C. 2615(a)(1) "largely mimics that of" Section 8(a)(1) of the National Labor Relations Act (NLRA), 29

U.S.C. 158(a)(1), which "provid[es] that it is an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed' by § 7 of the NLRA." *Bachelder* v. *America W. Airlines, Inc.*, No. 99-17458, 2001 WL 883701, at *4 (9th Cir. Aug. 8, 2001). "Because the FMLA's language so closely follows that of the NLRA, the courts' interpretation of § 8(a)(1) of the NLRA helps to clarify the meaning of the statutory terms 'interference' and 'restraint.'" *Ibid.* (citing *Northcross* v. *Board of Educ.*, 412 U.S. 427, 428 (1973) (per curiam)).

"As a general matter, * * * the established understanding [of the NLRA] at the time the FMLA was enacted was that employer actions that deter employees' participation in protected activities constitute 'interference' or 'restraint' with the employees' exercise of their rights." *Bachelder*, 2001 WL 883701, at *5. This Court has also long recognized that under the NLRA, the determination whether particular employer conduct amounts to unlawful "interfere[nce]" with or "restrain[t]" of employees' exercise of statutory rights is principally entrusted to the National Labor Relations Board. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (stating, with specific reference to Section 8(a)(1) of the NLRA, that "[i]t is the primary responsibility of the Board and not of the courts to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.") (citation and internal quotation marks omitted).

In prohibiting employers from "interfer[ing] with" or "restrain[ing]" the exercise of FMLA rights, and in entrusting to the Secretary of Labor the task of administering the Act, Congress must be presumed to have intended that the Secretary would possess broad

authority to identify those forms of employer conduct that will likely hinder or deter employees' exercise of their rights under the FMLA. The Secretary has reasonably concluded that an employee's informed exercise of rights under the Act requires prior notice that particular periods of leave will be counted against the worker's 12-week statutory entitlement. The effect of the regulations pertinent to this case is that a covered worker who requests leave for a "serious health condition" may not be terminated from employment, based on his health-related inability to perform the functions of the job, unless and until the employer has (a) informed him that the leave will count against his 12-week FMLA entitlement and (b) thereafter allowed him to take 12 weeks of leave. An employer that dismisses such a worker without satisfying those prerequisites may properly be said to "interfere with" or "restrain" the employee's exercise of his rights under the Act, even though the employee receives 12 weeks of leave.

D. Although the leave entitlement conferred by the FMLA is limited to 12 weeks per year, the Act does not specify how employers and employees are to communicate about the relationship between FMLA and other leave, or spell out the consequences when the requisite communications are not made. See *Plant*, 212 F.3d at 935 ("The FMLA itself is silent as to the notice an employer must give to an employee before designating his paid leave as FMLA leave."). Such details could be described as filling in a "gap" in the Act within the meaning of *Chevron*, 467 U.S. at 843, or simply as matters for agency implementation within the normal scope of a broad delegation of legislative rulemaking authority to carry the Act into effect, see 29 U.S.C. 2654. Under either characterization, the absence of any

FMLA provision directly addressing the specific subject matter of the regulations at issue in this case further undermines the court of appeals' conclusion that those rules are contrary to the Act.[7]

E. The court of appeals itself "stressed that the court [wa]s not holding that any DOL regulations requiring employers to designate leave as FMLA leave would be invalid." Pet. App. A10. The court observed, by way of example, that "notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks." *Id.* at A10-A11. Even in that situation, however, the employer would effectively be required, as a result of its non-compliance with the regulatory notice requirement, to allow more

[7] Other provisions of the Act that recognize the obligation of employers to coordinate FMLA and non-FMLA leave reinforce the reasonableness of the DOL's approach. See, *e.g.*, *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989) ("[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (citation omitted). In particular, the leave substitution provisions in 29 U.S.C. 2612(d)(2) require an employer to take some positive action if it wants an employee's paid leave and FMLA leave to run concurrently. See, *e.g.*, 29 U.S.C. 2612(d)(2)(B) ("An eligible employee may elect, *or an employer may require the employee*, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee" for FMLA leave provided for a serious health condition.) (emphasis added). The Act also expressly recognizes that many employers provide leave independently of the FMLA, and provides some guidance on the proper relationship between FMLA leave and leave voluntarily provided by employers or mandated by state law. 29 U.S.C. 2651-2653.

than 12 weeks of leave for an FMLA-covered reason. If the court of appeals were correct that 29 C.F.R. 825.700(a) is "invalid insofar as it purports to require an employer to provide more than twelve weeks of leave time," Pet. App. A11, the hypothetical rules that the court regarded with apparent approval would be subject to the same objection.

Thus, despite the court of appeals' statement that the existing DOL regulations "directly contradict the statute by increasing the amount of leave that an employer must provide," Pet. App. A11, the court's decision ultimately rests on the fact that the Secretary has chosen to promulgate a categorical rule, rather than to mandate a case-specific inquiry into whether a particular employee suffered actual prejudice as a result of the employer's failure to provide timely notice. But while the Secretary might have adopted a regime of the sort the court of appeals preferred, she was not required to do so. Given the breadth of the Secretary's rulemaking authority under the Act, and the evident desirability of avoiding difficult retrospective inquiries into the presence or absence of prejudice in individual cases, the Secretary acted within her sphere of lawful discretion by adopting the rule in question.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

TRACY RAGSDALE, et al.,

Petitioners,

v.

WOLVERINE WORLD WIDE, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AARP, EQUAL RIGHTS ADVOCATES, THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, NATIONAL DEPRESSIVE AND MANIC-DEPRESSIVE ASSOCIATION, AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other *amici*. Some recent cases include *Pollard v. E. I. du Pont de Nemours & Co.*, 121 S.Ct. 1946 (2001); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); and *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

AARP is a nonprofit membership organization of more than 34 million persons, age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. In 1993 the Family and Medical Leave Act (FMLA) was enacted with strong support from AARP because of the horror stories of AARP members who lost their jobs either when they became ill themselves or when they cared for their ill spouse, children, or parents. Many AARP members are in that "sandwich" period of their lives where the responsibility

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[1] Copies of the parties' consent to the filing of this brief have been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. In accordance with Supreme Court Rule 37.6, *amici* state that no persons other than the *amici curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this brief, other than the counsel for Petitioner, Luther O. Sutter, who has been a member of NELA and as such has paid general membership dues.

for rearing their own child while caring for parents, grandparents and other members of their extended family falls on their shoulders. AARP, "IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES."

Equal Rights Advocates ("ERA") is a San Francisco-based human and civil rights organization dedicated to securing legal and economic equality for women through litigation. Since its inception in 1974, ERA has focused much of its effort on ensuring family-friendly workplaces, representing plaintiffs in two of the first pregnancy discrimination cases heard by the Supreme Court, *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). More recently, ERA has advised and represented individual women on the application and interpretation of the Family and Medical Leave Act.

The Legal Aid Society - Employment Law Center ("The LAS-ELC") is a non-profit public interest law firm that focuses exclusively on employment-related issues affecting the working poor throughout the nation. The LAS-ELC litigates enforcement actions under the FMLA to protect the rights of low-income, working women and men to take family/medical leave. For example, The LAS-ELC successfully litigated *Mora v. Chem-tronics, Inc.*, 16 F. Supp.2d 1192 (S.D. Cal. 1998) which decided a myriad of issues of first impression in the Ninth and other Circuits, including what constitutes adequate notice by both the employer and employee when the employee requests FMLA leave. The LAS-ELC continues its efforts to promote and to protect workplaces that allow employees to balance the demands of work and family.

The National Depressive and Manic-Depressive Association is a nonprofit organization, based in Chicago,

which is dedicated to more than 20 million adults with depression, 2.5 million adults with manic depression (bipolar disorder), and their families. Its mission includes improving access to care. The FMLA advances this goal by protecting the jobs of patients and families during periods of illness.

The National Women's Law Center ("Center") is a non-profit legal advocacy organization dedicated since 1972 to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. The Center focuses on major policy areas of importance to women and their families, including employment, education, family economic security, reproductive rights and health—with special attention to the needs of low-income women. Fair and adequate family and medical leave policies and programs, which allow women to balance their work and family responsibilities, are central to the Center's goals.

The interest of *amici* in this case is to protect the rights of the clients of NELA members, ERA and The LAS-ELC and to promote the mission of each *Amici*, by ensuring that the FMLA's goal of providing protected designated leaves of absence is fully realized. This cannot happen when the FMLA is interpreted in a way which makes it more difficult for employees to understand their rights under the Act.

INTRODUCTION

The Secretary of Labor's notice regulations fill gaps in the statutory scheme of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq. These regulations reasonably prescribe what information employers must provide to employees and when and how they must provide it.

This brief presents a detailed application of *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the regulations in question. When *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938 (8th Cir. 2000), *cert. granted* (June 25, 2001) invalidated the notice regulations, the Eighth Circuit failed to consider whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 841. The court of appeals below failed to recognize that there are gaps in the statute because the FMLA itself is silent as to the specifics of the "notice an employer must give to an employee before designating his paid leave as FMLA leave." *Plant v. Morton International, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000), *rehearing and suggestion for rehearing en banc denied* (July 25, 2000). Consequently, *Ragsdale* fails to give the requisite deference to the notice regulations in question.

SUMMARY OF ARGUMENT

Congress enacted the FMLA to provide eligible individuals with assurance that an employee's job, or an equivalent one, would be waiting upon his or her return to work. *Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 (7th Cir. 1997).

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 841 (1984), states that when "Congress has directly spoken to the precise question at issue" and the "intent of Congress is clear" then the agency's regulations must be set aside. However, if the agency's view "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," a court must defer to the agency's judgment. *Nationsbank of*

North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995).

In the instant matter, the Eighth Circuit erroneously concluded that Congress unambiguously expressed its intent with respect to notice issues and the FMLA. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938-39 (8th Cir. 2000), *citing* 29 U.S.C. §2612(e)(1). Consequently, the court of appeals failed to give "controlling weight" to the agency's judgment. 513 U.S. at 257.

The court of appeals disregards the fact that there are gaps in the FMLA. "The FMLA does not specify when the 12 weeks of FMLA leave begin or how FMLA leave is initiated. The FMLA provides that an employer or an employee may substitute paid leave for unpaid leave, but it does not specify how or when an employer or employee must inform the other that paid leave will be substituted for unpaid leave." *Chan v. Loyola University Medical Center*, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 7 (N.D. Ill. Nov. 23, 1999) (Gottschall, D.J.); *Plant v. Morton International, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000).

The notice regulations are a reasonable interpretation of the FMLA and promote its purposes. They are not intended to be a penalty or an entitlement by which employees can obtain leaves longer than 12 weeks. *Contra McGregor v. Autozone*, 180 F.3d 1305, 1308 (11th Cir. 1999); *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939 (8th Cir. 2000). The notice regulations reflect a "reasonable accommodation of conflicting policies" and deserve to be upheld. *Chan v. Loyola University Medical Center*, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 10 (N.D. Ill. Nov. 23, 1999), *quoting Chevron*, 467 US. at 843-44.

ARGUMENT

The FMLA was enacted to assist employees in balancing the "conflicting demands of work and personal life." The Act recognizes that on occasion an employee will be "incapable of performing her work duties for medical reasons." *Price v. City of Fort Wayne*, 117 F.3d 1022, 1024 (7th Cir. 1997). The FMLA provides eligible individuals with assurance that an employee's job, or an equivalent one, will be waiting upon her return to work. *Id.* at 1023.

A. *Chevron v. NRDC* Provides the Framework This Court Uses to Determine Validity of the FMLA Notice Regulations.

The Secretary of Labor is specifically directed to "prescribe such regulations as are necessary to carry out" the directives of the FMLA. 29 U.S.C. § 2654. In construing regulations of the Secretary of Labor, this Court has stated that if "Congress has not 'directly spoken to the precise question at issue,' we must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'" *Auer v. Robbins*, 117 S. Ct. 905, 909 (1997) *quoting Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Chevron sets the standards for reviewing a challenge to the validity of administrative regulations:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted). This Court explained that an administrative agency is empowered and required to formulate policy and make rules to fill gaps left by the underlying statute. *Id.* at 843.

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44 (footnotes omitted). Finally, this Court in *Chevron* emphasized again the deference to be accorded to regulations promulgated by an administrative agency:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Id. at 844-45 (citations, quotation marks and footnotes omitted).

B. Notice Regulations Fill Gaps in FMLA Scheme.

"Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown and Williamson Tobacco*, 529 U.S. 120, 158 (2000). The FMLA contains gaps because it "is silent as to the notice an employer must give to an employee before designating his paid leave as FMLA leave in the FMLA statutory scheme." *Plant v. Morton International, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000). The

Sixth Circuit also rejected the argument that the notice regulations are inconsistent with the statute "because the FMLA was intended to set out *minimum* labor standards." *Id.* (emphasis in original).

Another court has held that there are gaps in the FMLA scheme:

> [T]here is no question that there are gaps in the FMLA. As noted above, the FMLA does not, in general, prescribe what type of notice regarding FMLA leave an employer must provide employees. The FMLA does not specify when the 12 weeks of FMLA leave begin or how FMLA leave is initiated. The FMLA provides that an employer or an employee may substitute paid leave for unpaid leave, but it does not specify how or when an employer or employee must inform the other that paid leave will be substituted for unpaid leave.

Chan v. Loyola University Medical Center, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 7 (N.D. Ill. Nov. 23, 1999). *Accord Ritchie v. Grand Casino of Mississippi, Inc.*, 49 F. Supp.2d 878, 880-81 (S.D. Miss. 1999).

This Court recently held that "in extraordinary cases" "there may be a reason" for the Courts to "hesitate before concluding that Congress has intended" that a statute's ambiguity "constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown and Williamson Tobacco*, 529 U.S. at 159. This Court further explained that Congress is more likely to have answered the major questions and leave "interstitial" questions for the agency to answer. *Id.* (Congress did not authorize FDA to regulate tobacco).

In contrast, the FMLA notice regulations are ordinary in nature and address the "interstitial" questions of when FMLA leave begins, how FMLA leave is initiated, and how or when an employee or an employer go about specifying whether paid leave will count as FMLA leave.

C. Notice Regulations Are Reasonable Interpretation of FMLA Scheme.

The notice regulations are a reasonable interpretation of the FMLA statutory scheme because they reflect "Congress's concern with providing ample notice to employees of their rights under the statute." *Plant v. Morton International, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000). The notice regulations cannot be viewed as inconsistent with legislative intent merely because they generate "the possibility that employees could end up receiving more than twelve weeks of leave." *Id.* at 935-36.

1. Procedures Specified by Notice Regulations

The FMLA regulations require an employee to notify the employer of the need for leave. 29 C.F.R. §§ 825.302 and 825.303. The employee need not mention the Act by name, but must state a qualifying reason for the leave. *Id.* The employer must then decide if the employee is eligible for FMLA leave. If the employer decides that the employee is eligible for FMLA leave, then the employer must notify the employee that the leave is FMLA leave and will count toward the employee's 12-week entitlement. 29 C.F.R. § 825.208(b)(1).

The regulations require the employer to designate the leave as FMLA leave within 2 business days of obtaining sufficient information that the reason for the leave is

covered by the FMLA. *Id.* The form of the notice is very flexible. Notice can be provided orally or in writing. 29 C.F.R. § 825.208(b)(2). But if the notice is oral, it must be confirmed in writing shortly thereafter. *Id.*

"The written notice may be in any form, including a notation on the employee's pay stub." *Id.* If an employer does not notify an employee that leave is designated as FMLA leave, then the leave is not counted toward the employee's entitlement. 29 C.F.R. §§ 825.208(c) and 825.700(a). In addition, an employer is required to notify the employee whether the employer will require paid FMLA leave to be substituted for unpaid leave. 29 C.F.R. §§ 825.208(c) and 825.301(b)(1)(iii). If an employer cannot initially determine whether leave is covered by the FMLA, an employer is only then allowed to designate leave retroactively. 29 C.F.R. § 208(d) and (e).

Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 938 (8th Cir. 2000) and *McGregor v. Autozone*, 180 F.3d 1305, 1308 (11th Cir. 1999) both stress that in some circumstances the regulations result in employers providing more than 12 weeks of leave. But the regulations only impose a "modest burden" on an employer in order to avoid this situation. *Chan v. Loyola University Medical Center*, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 9 (N.D. Ill. Nov. 23, 1999). This situation can occur only when (a) the employer has enough information to determine that the leave is for a reason covered by the FMLA and (b) the employer fails to notify the employee that the leave is FMLA leave. *Id.*

2. Benefits of Notice Regulations

The regulations are reasonable because they have the "salutary effect of ensuring that employees are made

aware of their rights under the FMLA." *Id.* When employees are informed whether leave is FMLA leave and whether it counts toward the 12 week entitlement, "they will better be able to plan and manage their allotment of leave." *Id.* The notice regulations also help to avoid misunderstandings between employers and employees, especially where the employee erroneously believes her position is protected and fails to return to work during the entitlement period, but might have been able to return to work sooner, even if this would be difficult. *Id.*

The construction of the FMLA, as set forth in *Ragsdale* and *McGregor*, that Congress only wanted to provide 12 weeks of leave is plausible. But it is "not the only reasonable interpretation of the Act. Another interpretation, that of the Department of Labor, recognized gaps in the FMLA." *Id.* at 10.

> The Department concluded that it was important that employees be informed of their rights under the FMLA and determined that employers should bear some modest burden of informing employees about certain aspects of FMLA leave as to which the statute gives the employer choices. Among other things, the regulations impose on employers an obligation to notify employees that a leave is FMLA leave and that, if the employer so elects, paid leave must be used for FMLA. The regulations reflect a concern for accommodating employers by, among other things, allowing flexibility as to the form of the notice and permitting retroactive designation of leave as FMLA leave in some circumstances.

Id.

The burden on the employer is modest indeed. Notification can be accomplished through any type of writing, even a notation on a pay stub. 29 C.F.R. § 825.208(a), (b)(1) and (b)(2). The Department of Labor also provides an optional prototype notice which states in part:

> This is to inform you that: (check appropriate boxes, explain where indicated)
>
> 1. You are [ ] eligible [ ] not eligible for leave under the FMLA.
> 2. The requested leave [ ] will [ ] will not be counted against your annual FMLA leave entitlement.

Appendix to FMLA Regulations. 29 C.F.R. §§ 825.100 *et seq.*

Even the Eighth Circuit's *Ragsdale* opinion recognizes that under certain circumstances an employee who does not receive notice that she is on FMLA leave will be prejudiced: "[N]otice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks." 218 F.3d at 939-40. Also, in foreseeable leave situations, *Ragsdale* states that "an employer's failure to provide notice that the leave counts against the FMLA entitlement could interfere with the employee's ability to plan and use future FMLA leave." *Id.* at 940.

3. Employer Ignorance of Notice Regulations

This Court holds that the "principle that ignorance of the law is no defense applies whether the law be a

statute or a duly promulgated and published regulation." *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971). This is an inflexible rule and "'lies at the foundation of the administration of justice.'" *The Duty of the Government to Make the Law Known*, 51 Fordham L. Rev. 255 fn. 4 (1982), *quoting* 1 F. Wharton, Wharton's Criminal Law § 400, at 579-80 (1932) (footnotes omitted).

The common thread which *Ragsdale*, *McGregor*, *Plant* and *Chan* share is that the employer in each case apparently was ignorant of the requirements of the FMLA notice regulations during the period in which the employees were on leave. But given the widespread publicity about the FMLA since its enactment in 1993, no employer who is subject to its terms (by virtue of employing 50 or more employees within a 75 mile radius, 29 U.S.C. § 2611(2)(B)) could convincingly claim ignorance of the existence of the Act itself. Consequently, it is reasonable to expect that employers subject to the FMLA will take whatever steps are necessary to comply with the Act and its regulations.

4. Notice Regulations Provide Clear Guidance

Another reason that the notice regulations are a reasonable interpretation of the FMLA scheme is that they provide clear guidance to employers and employees. Absent this guidance, not only would employees be less informed about their FMLA rights, litigation would likely increase over the issues of "when the 12 weeks of FMLA leave begin or how FMLA leave is initiated." *See Chan v. Loyola University Medical Center*, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 7 (N.D. Ill. Nov. 23, 1999). Also, increased litigation is

likely because the "FMLA provides that an employer or an employee may substitute paid leave for unpaid leave, but it does not specify how or when an employer or employee must inform the other that paid leave will be substituted for unpaid leave." *See id.*

In contrast, upholding the notice regulations will eliminate the threat of additional litigation over these issues and likely decrease FMLA litigation even more over time. Reversal of the court of appeals below will confirm that employers and employees have a duty to abide by the notice regulations. A reversal by this Court will likely alert employers covered under the Act—who are still ignorant of the notice regulations—that they must take steps to comply with them. *See generally Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) and *Burlington Industries v. Ellerth*, 524 U.S. 742, 744 (1998) (holding in these cases provides incentive to employer to exercise reasonable care and adopt policies "to prevent and correct promptly any sexually harassing behavior").

D. Notice Regulations are a "Reasonable Accommodation of Conflicting Policies."

Given that there are gaps in the FMLA scheme, the notice regulations reflect a "reasonable accommodation of conflicting policies" and deserve to be upheld. *Chan v. Loyola University Medical Center*, 6 Wage & Hour Cas. 2d (BNA) 328, 1999 WL 1080372, slip op. at 10 (N.D. Ill. Nov. 23, 1999), *quoting Chevron*, 467 US. at 843-44. *Ragsdale* emphasizes that the FMLA was intended to "accommodate the legitimate interests of employers." 218 F.3d at 939, *citing* 29 U.S.C.§ 2601(b)(3). Nevertheless, "the stated purposes of the FMLA to 'balance the demands of the workplace with the needs of families' and

'entitle employees to take reasonable leave for medical reasons' ***implicitly require*** that employees be made aware of their rights and responsibilities under the FMLA." *Chan v. Loyola University Medical Center*, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 10 (N.D. Ill. Nov. 23, 1999) (emphasis added).

For these reasons, *Amici* urge the Court to reverse the decision below and uphold the notice regulations of the Secretary of Labor.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge that the judgment below be reversed and the case remanded with the direction that the Secretary of Labor's FMLA notice regulations are valid and must be applied by the District Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TRACY RAGSDALE, *et al.*,
Petitioners,

v.

WOLVERINE WORLDWIDE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 66 national and international labor organizations with a total membership of approximately 13 million working men and women. The National Partnership for Women and Families (formerly the Women's Legal Defense Fund) is a nonprofit, nonpartisan organization that promotes, through public education and advocacy, fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The AFL-CIO and the National Partnership for Women and Families file this brief as *amicus curiae* in support of petitioners with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT

The Family and Medical Leave Act (FMLA) requires covered employers to grant each eligible employee "a total of 12 work-weeks of leave [for four specified reasons] during any 12-month period," including leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1). A covered employer is one that employs 50 or more employees. 29 U.S.C. § 2611(4)(A). An "eligible employee" is, generally, someone employed at a worksite with 50 or more employees, who has worked for the

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

employer at least 12 months and has performed at least 1,250 hours of service during the 12 months prior to requesting leave. 29 U.S.C. § 2611(2)(A).

The issue in this case is whether Wolverine Worldwide, Inc. violated the FMLA when the Company denied Wolverine employee Tracy Ragsdale's September 26, 1996 request for FMLA medical leave.

On March 17, 1995, Ragsdale began employment with Wolverine. Pet. App. A2. In February 1996, eleven months later, Ragsdale was diagnosed with cancer, and on February 21, she requested a medical leave of absence. *Id.* Because she had worked for Wolverine for 11 months, and not the 12 months required to become an FMLA "eligible employee," 29 U.S.C. § 2611(2)(A)(i), Ragsdale did not qualify for FMLA leave as of the date of her request. Ragsdale did, however, qualify for "sick leave" under the terms of Wolverine's collective bargaining agreement with Local 2008 of the United Food & Commercial Workers International Union, AFL-CIO. *See* Answer to Second Amended Complaint ¶ 11. The agreement provided "sick leave" for employees with at least six months of Company service. *See* Pet. App. A2. And, Wolverine did grant Ragsdale "sick leave" under the Company's collectively bargained leave policy. *Id.*

Wolverine's "sick leave" policy provided for 30 days of leave and for up to six 30-day extensions, each available only upon a properly supported separate request. Pet. App. A2. On March 18, Ragsdale submitted her first request for an extension of her Company "sick leave." *Id.* While Ragsdale had been employed by Wolverine for 12 months as of March 17 and was thus eligible for FMLA leave, the Company treated her March 18 request for further medical leave as a request for Company "sick leave" and granted Ragsdale a second 30-day period of leave under the Company policy. *See* 29 C.F.R. § 825.110(b) (leave time during which

employee received either compensation or benefits counts toward the 12-month service requirement).

Ragsdale thereafter requested, and was granted, successive 30-day periods of leave under the Company "sick leave" policy on April 22, May 21, June 20, July 22, and August 15 of 1996. Pet. App. A2. Wolverine consistently treated Ragsdale's leave as Company "sick leave" and not as FMLA medical leave. Accordingly, Wolverine never designated Ragsdale's leave as FMLA leave in the Company's FMLA compliance records nor did the Company ever inform Ragsdale that her leave was FMLA leave counting against Ragsdale's 12-week leave entitlement under the FMLA.

Then, on September 20, Wolverine terminated Ragsdale's employment, because she had exhausted her Company "sick leave" and was still physically unable to return to work. Pet. App. A2. In response, Ragsdale requested further medical leave, expressly invoking the FMLA for the first time. Pet. App. A2. Wolverine denied this request for FMLA leave. *Id.* Ragsdale then requested that she be allowed to return to work on a reduced-hour schedule, but Wolverine denied this request as well. *Id.*

Ragsdale brought suit challenging, *inter alia*, Wolverine's denial of her September 26 request for FMLA medical leave as a violation of the Act. In the district court, Wolverine defended on the ground that Ragsdale was never entitled to FMLA leave, because she had only 11 months of service with Wolverine at the time her Company "sick leave" commenced. Pet. App. B4. The district court rejected this argument, concluding that Ragsdale's period of leave counted toward meeting the FMLA's 12-month service requirement. *Id.* at B5.[2]

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[2] Under Wolverine's leave policy, Ragsdale was maintained on the Company payroll and received medical benefits during her leave. Thus, under the Secretary of Labor's regulations, Ragsdale's leave time counted

The district court, nevertheless, dismissed Ragsdale's FMLA claim, holding that, as of September 26, Ragsdale had already received more than the 12 weeks of medical leave to which an employee is entitled under the FMLA. Pet. App. B8-B9. The Eighth Circuit affirmed the district court's legal conclusion and the dismissal of Ragsdale's FMLA claim. *Id.* at A11.

In dismissing Ragsdale's FMLA claim, the courts below invalidated a Department of Labor regulation that requires an employer to designate FMLA-qualifying leave as FMLA leave at the time the leave is granted and forbids an employer to count against an employee's 12-week FMLA leave entitlement any period of leave that the employer did not contemporaneously designate as FMLA leave. *See* Pet. App. A11 (declaring invalid the last sentence of 29 C.F.R. § 825.700(a)). Those courts held that the regulation was invalid, on the ground that it imposed "a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave." *Id.* at A9.

SUMMARY OF ARGUMENT

The Family Medical Leave Act requires covered employers to provide qualified employees with a total of 12 weeks medical or family leave each year. The Act forbids employer interference with the exercise of FMLA rights as well as outright denial of such rights. The Secretary of Labor is charged with ensuring employer compliance with the FMLA and with seeking enforcement of the Act through administrative action or by bringing a civil action to redress violations. The FMLA authorizes the Secretary of Labor to issue regulations implementing both the substantive and the enforcement provisions of the Act.

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toward meeting the 12-month service requirement. 29 C.F.R. § 825.110(b).

Acting pursuant to her statutory authority, the Secretary of Labor has issued a comprehensive set of FMLA regulations. In delineating an employer's FMLA obligations, the Secretary has adopted regulations requiring employers to contemporaneously designate FMLA-qualifying leave as FMLA leave and to notify the employee of this designation. In this regard, the employer's FMLA designation of leave—and the attendant compliance records—must indicate whether the leave in question counts against the employee's 12-week FMLA annual leave entitlement and the employee must be so notified. If an employer fails to designate leave as FMLA leave and so notify the employee, the employer may not later count the leave against the employee's FMLA 12-week leave entitlement.

The contemporaneous-designation/notice-of-designation regulations reasonably implement the FMLA's prohibition of employer interference with employee FMLA rights. By requiring contemporaneous designation of leave by employers and forbidding after-the-fact recharacterization of leave, the regulations prevent employers from manipulating leave designations in a manner that interferes with the exercise of FMLA rights. In addition, by requiring employers to make accurate and reliable contemporaneous designations, to provide employees notice of the designations and to maintain compliance records of these designations and notices, the regulations implement the Act's record-keeping provisions in a manner that facilitates enforcement of the Act.

The regulation providing that, after the fact, an employer cannot count a period of leave not originally designated as FMLA leave against an employee's 12-week FMLA entitlement is integral to the set of contemporaneous-designation/notice-of-designation regulations. That regulation is proper and does not impose a penalty on employees or extend the FMLA leave entitlement beyond the statutory limits.

ARGUMENT

The Family and Medical Leave Act authorizes the Secretary of Labor to issue regulations implementing both the Act's substantive provisions and its enforcement provisions. 29 U.S.C. §§ 2616(b), 2619(a) & 2654. Acting pursuant to this grant of authority, the Secretary has issued a comprehensive set of regulations. 29 C.F.R. Part 825.

At issue in this case are the regulations issued by the Secretary defining the obligations of a covered employer upon receiving an FMLA-qualifying request for leave to contemporaneously designate the leave as FMLA leave, counting against the employee's 12-week annual entitlement, and to contemporaneously notify the employee of that designation. 29 C.F.R. §§ 825.208(a) & 825.301(b)(1). The particular aspect of the contemporaneous-designation/notice-of-designation regulations invalidated by the court below is the provision that an employer may not count any period of leave that the employer did not contemporaneously designate as FMLA leave against an employee's 12-week FMLA leave entitlement. 29 C.F.R. § 825.700(a). *See also* 29 CFR § 825.208(c).

The court of appeals acknowledged that the Secretary has authority to issue "regulations requiring employers to designate leave as FMLA leave" and that "[t]here are various situations in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights." Pet. App. A10. But the court below held that the regulation, by providing that an employer may not count undesignated leave against the employee's FMLA entitlement, imposes "a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave." *Id.* at A9.

The lower court's ruling rests on a mischaracterization of the regulation at issue here as a penalty provision. What the regulations do is delineate the administrative steps an

employer must take to meet its obligation to grant eligible employees their FMLA leave entitlement and provide that an employer who does not take the steps of contemporaneously designating granted leave as FMLA leave and so notifying the employee may not later treat that leave as FMLA leave. These rules are not in any way punitive or unfair to the employer, who is only required to make a contemporaneous record designating grants of FMLA leave, to provide affected employees notice that the leave has been recorded as FMLA leave, and to base its calculation of an employee's remaining FMLA leave on the employer's own contemporaneous designation of the type of leave already granted. These rules further important statutory purposes in that they: (i) promote compliance with the Act by encouraging employers to accurately record leave as FMLA leave; (ii) prevent employer manipulations of leave designations that interfere with the ability of employees to exercise FMLA rights; and (iii) provide employees with reliable information on their FMLA leave status and entitlement. Contrary to the characterization of the courts below, the regulations do not provide employees more than their statutory entitlement of 12 weeks of FMLA leave within any 12-month period. Rather, the regulations estop an employer from changing its designation of leave already granted as the basis for denying what would otherwise be a valid request for FMLA leave.

In what follows, we first set out the pertinent statutory provisions. We then describe the interlocking set of regulations that provide the setting for the regulation invalidated by the court of appeals. After having placed the issue here in the proper statutory and regulatory context, we conclude by showing that the regulation in question is reasonably designed to implement the FMLA's statutory provisions.

I. **The FMLA Statutory Provisions.** At the core of the FMLA are the general leave requirements stated in Title I of

the Act. 29 U.S.C. §§ 2611-2619. The most basic of the FMLA leave requirements is that qualified employees of covered employers are entitled to a leave of absence from their employment for any one of four specified reasons, including "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee," and that covered employers have a legal obligation to grant a proper request for such leave by a qualified employee. 29 U.S.C. § 2612(a)(1). The employer may require that a request for serious medical condition leave "be supported by a certification issued by the health care provider" of the employee or the relative for whom the employee seeks leave to care, but the statute defines what certification "shall be sufficient." 29 U.S.C. § 2613.

Generally, an employee is entitled to 12 weeks of leave under the statute in any given 12 month period. 29 U.S.C. § 2612(a). However, leave taken for a "serious health condition"—either of the employee or of a close relative for whom the employee is caring—"may be taken intermittently or on a reduced leave schedule when medically necessary," and when leave is taken intermittently or on a reduced schedule only "the amount of leave actually taken" may be counted against the employee's 12-week annual entitlement. 29 U.S.C. § 2612(b)(1).

The Act, in addition, provides for certain "employment and benefit protections" in connection with FMLA leave. *See* 29 U.S.C. § 2614. The employer must "maintain coverage [of any employee on FMLA leave] under any 'group health care plan' (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave." 29 U.S.C. § 2614(c)(1). And, upon return from FMLA leave, an employee is entitled to "be restored . . . to the position of employment held by the employee when the

leave commenced" or "to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1). "The taking of leave under [the FMLA] shall not result in the loss of any employment benefit accrued to the date on which the leave commenced." 29 U.S.C. § 2614(a)(2).

FMLA leave "may be provided without compensation." 29 U.S.C. § 2612(c). At the same time, "[a]n eligible employee may elect, or an employer may require the employee, to substitute" various sorts of "accrued paid leave"—such as vacation leave, personal leave, family leave, medical leave or sick leave—"for any part of the 12-week period of such leave under [the FMLA]." 29 U.S.C. § 2612(2).

The Act expressly contemplates that employers may have policies or plans providing employees with leave that supplements or coincides with FMLA leave. In this regard, the FMLA provides *both* that the Act shall not be "construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act," 29 U.S.C. § 2652(a), *and* that "[t]he rights established for employees under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan," 29 U.S.C. § 2652(b).

Section 105 of the Act, in its turn, defines certain "prohibited acts." 29 U.S.C. § 2615. This section makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [Title I of the FMLA]." 29 U.S.C. § 2615(a). Any covered employer who "interefere[s] with, restrain[s], or den[ies] the exercise" of rights under the FMLA's general leave provisions is subject to a civil action brought by an employee and an award of damages in the amount of lost "wages, salary, employment benefits, or other compensation"

and "equitable relief . . . including employment, reinstatement, and promotion." 29 U.S.C. § 2617(a).

In order "[t]o ensure compliance" with the Act's general leave provisions, the FMLA grants the Secretary of Labor broad "investigative authority." 29 U.S.C. § 2616(a). To assist the Secretary in exercising her investigative authority, employers are required to "make, keep, and preserve records pertaining to compliance with [the Act's general leave provisions] . . . in accordance with regulations issued by the Secretary." 29 U.S.C. § 2616(b). The Secretary may require an employer to submit these records for inspection once each year. 29 U.S.C. § 2616(c). In addition, the Secretary may require an employer to submit its records more frequently where she "has reasonable cause to believe there may exist a violation of [the FMLA general leave provisions] or any regulation or order issued pursuant to [those provisions]." 29 U.S.C. § 2616(c).

The Act further directs the Secretary to "receive, investigate, and attempt to resolve complaints of violations [of the FMLA general leave provisions]." 29 U.S.C. § 2617(b)(1). When the Secretary "is investigating a charge" alleging such violations, she may order the employer to submit its compliance records to her for inspection. 29 U.S.C. § 2616(c).

If the Secretary concludes that an employer has violated the FMLA general leave provisions, she may bring a civil action to recover damages on behalf of the injured employees. 29 U.S.C. § 2617(b)(2). In addition, the Secretary may seek injunctive relief restraining interference with or denial of any rights granted by the FMLA general leave provisions and ordering employment, reinstatement or promotion of affected employees. 29 U.S.C. § 2617(d).

II. **The Secretary of Labor's FMLA Regulations.** The FMLA directs the Secretary of Labor to "prescribe such

regulations as are necessary to carry out" both the general leave provisions contained in Title I of the Act and the provisions addressed to the effect of other employer leave policies on FMLA leave contained in Title IV. 29 U.S.C. § 2654. The FMLA further provides that the employer obligation to "make, keep, and preserve records pertaining to compliance" shall be carried out "in accordance with regulations issued by the Secretary." 29 U.S.C. § 2616(b). The contemporaneous-designation/notice-of-designation regulations at issue here were promulgated by the Secretary pursuant to these statutory grants of authority.

A. The FMLA regulation invalidated by the court is contained in the subpart of the regulations addressing "how do other . . . employer practices . . . affect employee rights under FMLA?" 29 C.F.R. Part 825, Subpart G, reads, in pertinent part, as follows:

> "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a). [3]

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[3] A similar rule also appears in the subpart of the regulations addressing "What leave is an employee entitled to take?" 29 C.F.R. Part 825, Subpart B. Section 825.208 of that subpart addresses generally "[u]nder what circumstances may an employer designate leave, paid or unpaid, as FMLA and, as a result, count it against the employee's total FMLA leave entitlement?" Answering this question, paragraph (c) of this section provides:

> "If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the

B. The employer obligations to contemporaneously designate leave as FMLA leave and to inform the employee of the designation that form the basis for § 825.700(a) are stated in several FMLA regulations.

Section 825.208 (a) of the regulations provides that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying." Likewise, the regulations describing "what records must be kept to comply with the FMLA," 29 C.F.R. Part 825, Subpart E, require that qualifying "[l]eave must be designated in [the employer's] records as FMLA leave." 29 C.F.R. § 825.500(c)(2). In this regard, the regulations specify that the employer's "records . . . must disclose . . . [d]ates FMLA leave is taken by FMLA eligible employees." *Id.*

In addition to providing that "it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying," the regulations also require the employer "to give notice of the designation to the employee." 29 C.F.R. § 825.208 (a). In meeting the obligation to notify an employee of the leave's designation, an employer is specifically required to state whether "the leave will be counted against the employee's annual FMLA leave entitlement." 29 C.F.R. § 825.301(b)(1)(i). *See id.* (cross-referencing § 825.208). "The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing," but, "[i]f the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday)." 29 C.F.R. § 825.208 (b)(2). This notice must be given to the employee at the time of the leave

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notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement." 29 C.F.R. § 825.208(c).

request, unless a notice containing the same information has been given to the employee within sixty days. 29 C.F.R. § 825.301(c).

The regulations require employers to keep, as part of their FMLA compliance records, "[c]opies of all . . . specific written notices given to employees as required under . . . § 825.301(b)," including the notices sent to employees who have requested leave informing them of whether the leave counts against the 12-week FMLA entitlement. 29 C.F.R. § 825.500(c)(4). Employers are also required to keep "[r]ecords of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement." 29 C.F.R. § 825.500(c)(7).

To facilitate employer compliance, the regulations set out a "Prototype Notice: Employer Response to Employee Request for Family and Medical Leave," 29 C.F.R. App. D, that employers may use "to meet the[] specific notice requirements of the regulations," 29 C.F.R. § 825.301(b)(2). The Prototype Notice provides spaces where the employer can indicate, by checking various boxes, both the FMLA-qualifying basis for the leave and whether "[t]he requested leave □ will [or] □ will not be counted against [the employee's] annual FMLA leave requirement." 29 C.F.R. App. D. In addition, the Prototype Notice calls on the employer to specify the beginning and ending dates of the leave and whether, in the case of leave due to a serious health condition, medical certification will be required. *Id.*

III. **The FMLA Regulation At Issue Here Is Proper.** The FMLA contemporaneous-designation/notice-of-designation regulations state a reasonable means of implementing the Act's leave provisions that serve to assure against employer "interfere[nce] with . . . the exercise of . . . any right provided under th[e Act,]" 29 U.S.C. § 2615(a), through manipulation

of the employer's non-statutory leave policies in a manner that "diminishe[s]" any of "[t]he rights established for employees under th[e] Act," 29 U.S.C. § 2652(b). Those regulations, by specifying what an employer is required to do in "mak[ing], keep[ing], and preserv[ing leave designation] records pertaining to compliance," 29 U.S.C. § 2616(b), also serve as a reasonable means of implementing the statutory provisions charging the Secretary with "ensur[ing] compliance with the provisions of the [Act]" and providing her with "investigative authority." 29 U.S.C. § 2616(a). And, contrary to the court of appeals' view, these regulations are not subject to the objection that they provide employees with more than the statutory entitlement of 12 weeks of FMLA leave within any 12-month period.

A. The FMLA recognizes that covered employers may have company leave policies that provide for employee leave that differs from the employee leave entitlement provided for by the FMLA. In that regard, the Act provides for the coexistence of the two types of leave by stating that "[n]othing in this Act . . . shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the right established under this Act," and that "[t]he rights established under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." 29 U.S.C. § 2652.

The Act also forbids "any employer . . . interfere[nce] with . . . the exercise of or the attempt to exercise, any [FMLA] right." 29 U.S.C. § 2615. And, "'[i]nterfering with' the exercise of an employee's rights would include manipulation by a covered employer to avoid responsibilities under FMLA. . . ." 29 C.F.R. § 825.220(b).

Against this background, proper implementation of the Act requires rules delineating which grants of leave are to be

regarded as grants of company policy leave, which are grants of FMLA leave, and which are grants of leave under both the FMLA and a parallel company leave policy and the FMLA. Not least of all, proper implementation of the Act requires such rules to assure against "manipulation" by which a covered employer might seek to "avoid responsibilities under [the] FMLA," 29 C.F.R. § 825.220(b), by first opportunistically designating leave as company policy leave and then later redesignating it as FMLA leave.

That being so, in adopting the regulations at issue here, the Secretary pointed to the need "to eliminate protracted 'after the fact' disputes" by "resolving the question of FMLA designation as early as possible in the leave request process." 60 Fed. Reg. 2180, 2207 (1995). Providing for the proper designation of leave early and eliminating after-the-fact redesignations—as mandated by the regulations—requires an employer to responsibly designate leave at the time it is taken and precludes an employer from making opportunistic redesignations at a later time.

The basic point attended to by the regulation is this: an employer's initial designation of an employee's leave as company policy leave rather than FMLA leave, followed by after-the-fact redesignation of the leave as FMLA leave, interferes with the exercise of rights under the FMLA—and thus diminishes those rights—because the Act guarantees employees more than simply time off from work: the FMLA guarantees leave under certain specified conditions and with certain specified protections.

In the first place, employees on FMLA leave—but not employees on company policy leave—are entitled by the Act to: guaranteed use of accrued paid leave, such as earned paid vacation days, for FMLA leave; a guaranteed job upon expiration of the leave; a guarantee against reduction of any benefits for having taken the leave; and a guarantee of continued health care coverage during the period of the leave.

29 U.S.C. § 2614 ("Employment and benefits protection"). An employee placed on company policy leave has no basis for believing that these guarantees apply to her and no basis for demanding these employment and benefits protections.

The FMLA also guarantees that an employee can take just so much leave as she needs to attend to a serious medical condition. Thus, FMLA medical leave can be taken on an intermittent or a reduced schedule basis and does not have to be taken in whole day or whole week increments. 29 U.S.C. § 2612(b)(1). These options can effectively extend the total period during which leave is taken, because only the time actually away from work is counted against the 12-week FMLA entitlement. 29 U.S.C. § 2612(b)(1). The Secretary of Labor has noted that cancer victims, such as Ragsdale, are particularly likely to invoke one of these options in order to cope with the effects of chemotherapy. 29 C.F.R. § 825.203(c)(1).

Finally, employees on FMLA leave cannot be required to comply with employer extension requirements going beyond the prerequisites for leave specified in the statute. In particular, an employee on FMLA leave cannot be required to request continuation of her leave in the 30-day increments provided for by Wolverine's leave policy. *See* 29 C.F.R. § 825.308(b)(1).

Absent the contemporaneous-designation/notice-of-designation requirements, employers could easily manipulate the co-existence of two sources of similar medical leave—each entailing different employer obligations and different employee rights—in a manner that interferes with the exercise of FMLA rights. Employers have every incentive to respond to an FMLA-qualifying leave request by initially characterizing the grant of leave as employer policy leave—which does not carry any of the FMLA protections or guarantees—and not FMLA leave—which does. Where an employer so characterizes a grant of leave, the employee,

faced with the risk that her employment might be adversely affected by taking leave, may choose to keep working after all, or she may forego one or more of the statutory rights just outlined in connection with whatever leave is taken. And, where the employee does take leave, the employer would be free to later change the leave's characterization by designating it FMLA leave—after the employee has forgone her statutory rights—and deny a later leave request on the ground that the leave previously granted and taken was in fact FMLA leave that counted against the employee's 12-week entitlement. The Secretary's regulations implement the Act by mandating that employers take designation actions that preclude these adverse possibilities.

B. The contemporaneous-designation/notice-of-designation regulations are, moreover, a proper exercise of the Secretary's authority to issue regulations defining a covered employer's obligation to "make, keep, and preserve records pertaining to compliance with th[e FMLA]." 29 U.S.C. § 2616 (b).

The most basic record of "compliance with th[e FMLA]" is a record showing what FMLA leave has been granted and for what periods of time. A necessary part of any such record is a designation by the employer of whether the leave being recorded was treated as FMLA leave and whether the leave counts against an employee's 12-week annual leave entitlement.

The requirement that the employer notify the employee of the designation recorded in the employer's records—together with the closely related requirement that the notice be maintained in the employer's compliance records along with any correspondence related to a dispute over the designation, 29 C.F.R. § 825.500(c)(7)—is also related to the exercise of the Secretary's "investigative authority" in the service of "ensur[ing] compliance with the provisions of th[e Act]," 29 U.S.C. § 2616(a). Absent such notice, an employee could not be expected to raise any question of the employer's compliance with the Act or to take any action to assert her rights under the Act. *See* 29 U.S.C. § 2617(b)(1).

The statute assigns to the Secretary the task of inspecting these records to ensure that employers are in compliance with the FMLA leave requirements. 29 U.S.C. § 2616(c). And, the Secretary may bring an enforcement action in court based on violations uncovered through such inspections. 29 U.S.C. § 2617 (b), (d) & (e). The employer compliance records would be of little utility in this regard if employers were free to change their leave designations after a violation was discovered by the Secretary in inspecting the original records. Were that allowed, employers could confound the Secretary's enforcement efforts by changing their records to recharacterize leave in response to any determination that leave had been incorrectly treated as not FMLA-qualifying.

C. The particular regulatory provision invalidated by the courts below—the provision prohibiting employers from counting against an employee's 12-week FMLA leave entitlement any period of leave that the employer failed to contemporaneously designate as FMLA leave—is integral to the set of contemporaneous-designation/notice-of-designation regulations. The point of those regulations is to prompt employers to designate FMLA leave as such at the time the leave is granted—and to notify the employee of the designation—in the interests of preventing after-the-fact disputes on the nature of the leave and preventing employer manipulations that interfere with the exercise of employee rights under the Act. Permitting an employer to treat a grant of leave—that the employer had originally characterized as company policy leave—as FMLA leave that counts against the 12-week FMLA entitlement after-the-fact would run directly contrary to the logic of the regulations and would frustrate their purpose.

This is most easily demonstrated by considering the two possible alternatives to the Secretary's rule: (i) allowing an employer who at the time fails to designate a grant of leave as FMLA leave to always count that leave against the

employee's 12-week FMLA entitlement; or (ii) forbidding an employer to count leave not originally designated as FMLA leave *only* where it can be shown that the failure to designate resulted in concrete harm to the employee in question.

The first alternative would provide *no* incentive for an employer to comply with the contemporaneous-designation/notice-of-designation regulations and *no* protection to employees against employer manipulation of leave designations.

The second alternative would provide only a marginal incentive for employer compliance with the contemporaneous-designation/notice-of-designation regulations and only the most tenuous protection against employer manipulation of leave characterizations. Under this alternative, the employee would be required to prove a material detriment caused by the employer's failure to make a contemporaneous FMLA designation in order to claim the FMLA leave due to her by the employer's own records; proving such a detriment, after the events in question have occurred, would at least be difficult and more probably be all but impossible.

Both of the alternatives are thus clearly inferior to the categorical rule—adopted by the Secretary in the exercise of sound regulatory judgment—that more fully protects the rights granted by the Act and provides a greater incentive for accurate compliance record-keeping by employers.

D. Contrary to the courts below, the provision forbidding an employer from counting undesignated leave against an employee's 12-week entitlement does not result in an employee receiving more than 12 weeks of FMLA leave within any 12-month period. What the regulation does is allow an employee to rely on her employer's original characterization of leave as company policy leave or FMLA leave as the starting point in determining how much FMLA leave time she left has to draw upon.

The instant case demonstrates this point well. Ragsdale's claim is that, on September 26, 1996, she should have been given the 12 weeks of FMLA leave that she was due on the understanding—expressed by Wolverine, accepted by Ragsdale, and reflected in the Company's own compliance records—that up until that time she had not been granted, and thus had not exhausted, any of her 12-week annual FMLA leave entitlement. Ragsdale has *not* sought an order *re*designating any of the Company leave she had been granted to that point as FMLA leave. Nor has Ragsdale sought any substantive relief that would effectively turn any portion of the prior leave into FMLA leave. Thus, granting Ragsdale's claim would *not* result in her receiving leave under the FMLA for more than 12 weeks.

CONCLUSION

The judgment of the courts below should be reversed.

Respectfully submitted,

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IN THE

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council, LPA, Inc., and the Chamber of Commerce of the United States respectfully submit this brief *amici curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges this Court to affirm the decision below and thus supports the position of Respondent Wolverine World Wide, Inc. before this Court.

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes 360 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA, Inc. (LPA) is a public policy advocacy organization representing corporate executives interested in human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion of current situations and emerging trends in labor and employment policy. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce. LPA member companies have revenue exceeding $4.3 trillion annually.

The Chamber of Commerce of the United States (the Chamber or the Chamber of Commerce) is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and LPA's member companies, as well as many of the Chamber of Commerce's member companies, are employers subject to the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601 *et seq*. Many of these companies have leave policies more generous than any policies that merely comply with the requirements under the FMLA. For these reasons, EEAC, LPA, the Chamber of Commerce, and their members have an ongoing interest in any statute or regulation that serves to discourage employers from adopting or retaining more generous leave policies.

As such, the issue presented in this appeal is extremely important to the nationwide constituency that EEAC, LPA, and the Chamber of Commerce represent: whether the U.S. Department of Labor (DOL) Secretary acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the FMLA's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave.

EEAC, LPA, and the Chamber of Commerce thus have an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Furthermore, because of their significant experience in these matters, EEAC, LPA, and the Chamber of Commerce are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Tracy Ragsdale (Ragsdale) began her employment with Respondent Wolverine World Wide, Inc. (Wolverine) on March 17, 1995. In February 1996, she was diagnosed with cancer, and on February 21, 1996, she requested medical leave from Wolverine. Wolverine granted her request, and Ragsdale's leave commenced on that date. Pet. App. at 2.

Wolverine's leave policy allowed employees with six months of service to take leave for up to seven months. Ragsdale requested and was granted (in approximately 30 day increments) leave for seven months. Wolverine did not, however, notify Ragsdale of her eligibility for leave under the FMLA or her right to have leave designated as FMLA leave. Following the exhaustion of her eligibility for leave pursuant to Wolverine's policy and due to her continuing inability to return to work, Ragsdale was terminated from her employment with the company on September 20, 1996. *Id.* On September 26, 1996, Ragsdale requested that Wolverine grant additional FMLA leave. Pet. App. at 2-3. She was informed that she had requested and utilized all of her available leave. Ragsdale was released to return to work in December 1996. Pet. App. at 3.

On December 22, 1997, Ragsdale filed suit in the United States District Court for the Eastern District of Arkansas alleging, *inter alia*, a violation of the FMLA. On November 3, 1998, the district court granted summary judgment to Wolverine on Ragsdale's FMLA claim. Subsequently, Ragsdale filed an appeal in the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit upheld the district court and found that the DOL notice regulations—which provide that unless the employer prospectively designates company leave as FMLA leave, the twelve week FMLA leave entitlement does not begin to run—are based on an erroneous interpretation of the FMLA and cannot be enforced. *Id.* Ragsdale petitioned this Court for a writ of *certiorari*, which was granted.

SUMMARY OF ARGUMENT

The FMLA unambiguously limits protected leave to a *total* of twelve weeks in any twelve-month period. *See* 29 U.S.C. §§ 2612(a)(1); (d)(1); and (d)(2). The DOL notice regulations effectively create an entitlement to an additional twelve weeks of leave whenever an employer fails to notify an

employee that the employee is using FMLA leave. This is directly inconsistent with the plain language of the statute and its legislative history. Therefore, in applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), to the DOL notice regulations, the Court should determine that Congress' intent is clear; thus, the contrary regulations are not entitled to deference.

Even should the Court determine that the FMLA is silent or ambiguous on the issue, the DOL notice regulations are still invalid as they are "manifestly contrary to the statute." *Id.* at 844. The FMLA does not in any way suggest that the twelve-week entitlement may be extended. Where Congress wanted explicit notice provisions with significant consequences, it provided for them in the FMLA. Furthermore, adequate alternative safeguards exist to ensure that employees know of their rights granted by the FMLA.

Unfortunately, the DOL notice regulations discourage employers from adopting or retaining leave policies more generous than the FMLA requires, because the notice regulations punish employers who provide more generous plans with federal lawsuits simply because those employers failed to comply with an administratively-created technical notice requirement. Thus, rather than providing additional leave, employers may choose simply to give employees only the federal entitlement, thereby eliminating the administrative obstacles to providing additional worthwhile benefits to employees. This is clearly contrary to what the statute sought to encourage. For these reasons, the Court should uphold the judgment below with the direction that the DOL notice regulations are invalid and cannot be enforced.

ARGUMENT

I. IN APPLYING THE *CHEVRON* STANDARD TO THE FMLA NOTICE REGULATIONS, THE COURT SHOULD DETERMINE THAT CONGRESS' INTENT IS CLEAR; THUS, THE CONTRARY REGULATIONS ARE NOT ENTITLED TO DEFERENCE.

A. The Plain Language of the FMLA Unambiguously Limits Protected Leave to Twelve Weeks in Any Twelve-Month Period.

The FMLA unambiguously limits protected leave to a *total* of twelve weeks in any twelve-month period for the employee's serious health condition, for a family member's serious health condition, or for the birth of a son or daughter or the placement of a son or daughter with the employee for adoption, or foster care. 29 U.S.C. § 2612(a)(1).

In Section 2612(d)(1) of the FMLA, Congress set forth the relationship between the federal leave entitlement and voluntary employer-provided leave policies, further confirming that the statute entitles an employee to a maximum of twelve weeks of protected leave:

> If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the *12 workweeks of leave required under this subchapter* may be provided without compensation.

29 U.S.C. § 2612(d)(1) (emphasis added).

The DOL notice regulations effectively create an entitlement to an additional twelve weeks of leave whenever an employer fails to notify an employee that the employee is using FMLA leave. This is directly inconsistent with the plain language of the FMLA, which makes clear that eligible employees are entitled to a total of twelve weeks of leave. *See* 29 U.S.C. §§ 2612(a)(1) and (d)(1). Thus, the FMLA sets

both a minimum term of leave that employers must provide to employees and a *maximum* term that the statute requires. *See Ragsdale v. Wolverine World Wide, Inc.*, 218 F.3d 933, 937 (8th Cir. 2000), *cert. granted*, 121 S. Ct. 2548 (2001); *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999).

Section 2612(d)(2) of the FMLA provides additional support for the position that the DOL notice provisions are invalid. Section 2612(d)(2)(A) states that:

> In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under [the FMLA] . . . for any part of the 12 week period of such leave . . . .

29 U.S.C. § 2612(d)(2)(A).

The purpose underlying 29 U.S.C. § 2612(d)(2) is to protect employers who offer paid sick leave benefits to their employees from having to provide both those paid leave benefits and the twelve weeks of leave required by the FMLA separately. *See Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1205 (11th Cir. 2001); *Ragsdale*, 218 F.3d at 938. Congress intended that the FMLA provide employees with a minimum entitlement of twelve weeks of leave, while protecting employers against employees tacking their FMLA entitlement on to any paid benefit offered by the employer. Thus, while the FMLA requires employers to provide a total of twelve weeks of leave during a twelve-month period for the reasons specified in the statute, it does not require an employer to provide more.

Section 2612(d)(2) does not say that an employer who fails to designate an employee's paid vacation leave, personal leave, family leave, or sick leave as FMLA leave waives the right to substitute such leave for FMLA leave. Nor does the statute impose any requirement of advance designation of

leave as FMLA leave. The express language of the statute itself "does not impose any specific requirements for the type of notification an employer must provide or when that notification must occur." *McGregor*, 180 F.3d at 1307.

In sum, although DOL perceives "FMLA leave" as separate and distinct from any other leave that an employer may provide, such a characterization is found nowhere in the statute. The term itself is a creature of the regulations. An employer who provides an employee with at least twelve weeks of leave for any FMLA-covered purpose cannot violate the Act, regardless of what the leave is labeled.

B. The FMLA's Legislative History Clearly Reveals That Congress Intended That Employees Receive No More Than Twelve Weeks of Protected Leave Under the Statute.

A review of the FMLA's legislative history clearly reveals that Congress was extremely cognizant that it was providing a maximum of twelve weeks of protected leave under the statute. Indeed, Senator Edward Kennedy, a strong proponent of the FMLA, commented in debate on the Senate floor that, "[c]ompared to laws in other countries, this legislation is a modest response to the urgent needs of working families. Canada provides 15 weeks of family leave and twelve weeks of medical leave with the Government paying 63 percent of the cost. The West German Government pays 100 percent of the cost of 19 weeks of family leave for its workers." 137 Cong. Rec. S14147 (daily ed. Oct. 2, 1991).

The FMLA, when originally introduced, did propose to provide employees with much more protected leave, up to 18 weeks of family leave and 26 weeks of disability leave. 139 Cong. Rec. H389 (daily ed. Feb. 3, 1993). Twelve weeks, therefore, was not a random figure but rather the product of years of debate and compromise. *See also* H.R. Rep. No. 102-135, pt. 1, at 37 (1991) ("The amount of time available

for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees' perspective, a twelve week minimum represents a middle ground between the family needs of workers and an employer's business needs."). Hence, a construction of the statute that entitles employees to *more* than twelve weeks of leave runs afoul of Congressional intent.

C. The FMLA Notice Regulations Extend FMLA-Protected Leave Beyond Twelve Weeks and Therefore Deserve No Deference Under *Chevron*.

When a statute is silent or ambiguous on a precise question at issue, regulations promulgated by the agency empowered to address the question are entitled to deference. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). However, regulations that address an issue already unambiguously addressed by the statute are entitled to no deference. As the *Chevron* Court emphatically stated:

> First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Id. (footnote omitted).

In other words, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect," and "the judiciary . . . *must* reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9 (emphasis added). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987).

Notwithstanding the unambiguous twelve week statutory entitlement, DOL promulgated a regulatory scheme that directly contradicts the statutory limit. The notice regulations, 29 C.F.R. §§ 825.208(c) and 825.700(a), unequivocally purport to provide certain employees with more than twelve weeks of FMLA-protected leave. The statute, however, is *not* silent on this issue: Congress established—with a specific numerical integer—precisely how much leave is *protected by the FMLA*—twelve weeks. DOL's notice regulations, which effectively extend FMLA protection to leave taken in excess of twelve weeks, are contrary to the plain language of the statute and congressional intent. As a result, this Court should not give deference to the DOL notice regulations.

II. EVEN IF IT DETERMINES THAT THE FMLA IS AMBIGUOUS, THE COURT SHOULD NOT DEFER TO THE AGENCY INTERPRETATION, AS IT IS MANIFESTLY CONTRARY TO THE STATUTE.

A. The Eighth Circuit Correctly Determined That the FMLA Notice Regulations Create Rights Which the FMLA Clearly Does Not Confer.

As the *Chevron* Court explained, even where the statute is silent or ambiguous on a particular issue, implementing regulations addressing that issue nonetheless are invalid if they are "manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. This prong of the *Chevron* doctrine, therefore, prohibits DOL from seizing on a purported ambiguity or silence in one section of the statute by issuing a regulation that fundamentally contradicts a separate and distinct statutory provision. *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, __, 121 S. Ct. 903, 918-19 (2001).

Thus, even if, as Ragsdale contends, the statute is silent regarding notice, the Secretary cannot, under *Chevron*, flesh out this silence in such a way as to contradict the statute on a

separate issue that is addressed precisely and clearly—*i.e.*, the total extent of leave protected by the FMLA.

Although the statutory silence cited by Ragsdale *might* permit DOL to promulgate some regulation on "notice" of FMLA leave, it clearly does not permit DOL to issue *this regulation* that creates a leave entitlement in excess of the congressionally established limit. The DOL notice regulations "create rights which the [FMLA] clearly does not confer." *Ragsdale*, 218 F.3d at 939. Thus, however this argument is framed under *Chevron*, it is clear that DOL exceeded its authority.[2]

Numerous courts in addition to the Eighth Circuit have confirmed that the FMLA only protects twelve weeks of leave. In *Santos v. Shields Health Group*, 996 F. Supp. 87 (D. Mass. 1998), the court reasoned that any deficiency in employer-provided notice could not serve to extend FMLA protection past twelve weeks.

> The bottom line is that [the plaintiff] received more than that to which she was entitled under the FMLA, to wit, twelve workweeks of leave. In the context of this case, any inadequacy found to exist with respect to advising the plaintiff of her rights and obligations under the Act does not change this basic fact.

Id. at 93.

Other courts analyzing the FMLA's statutory provisions likewise have concluded that employers who fail to designate

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[2] The same conclusion holds under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), as this Court should conclude that the "validity of [DOL's] reasoning" lacks the "power to persuade" in that the agency exercised an "informed judgment" to which deference is owed. *Id.* at 140. DOL cannot contradict what is clearly provided for in the FMLA—the "total" extent of leave protected by the statute is twelve weeks. Any argument advanced for exceeding the congressionally established limit in the notice regulations cannot be deemed persuasive and based on a reasoned judgment.

leave as FMLA leave—but who provide the twelve-week leave entitlement—do not violate the FMLA. *See, e.g., McGregor*, 180 F.3d at 1307-08; *Fulham v. HSBC Bank USA*, __ F. Supp.2d __, 2001 U.S. Dist. LEXIS 13570, *23 (S.D.N.Y. Sept. 4, 2001); *Twyman v. Dilks*, 6 Wage & Hour Cas. 2d (BNA) 550, 560 (E.D. Pa. 2000); *Schloer v. Lucent Techs., Inc.*, 6 Wage & Hour Cas. 2d (BNA) 345 (D. Md. 2000); *Neal v. Children's Habilitation Ctr.*, 5 Wage & Hour Cas. 2d (BNA) 1278, 1280 (N.D. Ill. 1999); *Covey v. Methodist Hosp. of Dyersburg, Inc.*, 56 F. Supp.2d 965, 969-70 (W.D. Tenn. 1999). This Court should recognize the sound reasoning of these lower courts and conclude that the DOL notice regulations improperly convert the FMLA's minimum federally mandated unpaid leave into an entitlement to an additional twelve weeks of leave unless the employer provides the notification.

B. Where Congress Wanted Explicit Notice Provisions with Significant Consequences, It Provided for Them in the FMLA.

The FMLA does not in any way suggest that the twelve-week FMLA entitlement may be extended. Moreover, as the Eighth Circuit noted in this case, other sections of the FMLA strongly support the view that where Congress desired explicit notice provisions with significant consequences for their violation, it provided for them in the text of the statute.

In 29 U.S.C. § 2612(e)(1), the FMLA details notice obligations of employees to employers when requesting FMLA-qualified leave. In 29 U.S.C. § 2614(b)(1)(A), the FMLA allows an employer to refuse to restore a "highly compensated employee" to his or her former position if holding open the position would cause "substantial and grievous economic injury to the operations of the employer." In order to do so, however, the employer must give notice to the employee "at the time the employer determines such injury would occur" that the employer does not intend to

restore the employee to his or her position. *See* 29 U.S.C. § 2614(b)(1)(B). In addition, 29 U.S.C. § 2619 assesses monetary penalties for employers who do not post notices on the premises of the employer explaining FMLA rights.

If Congress had intended to harshly penalize employers who fail to designate leave as FMLA leave, it would have explicitly stated so in the statute. Congress "did not intend to construct a trap for unwary employers who already provide for twelve or more weeks of leave for their employees." *Ragsdale*, 218 F.3d at 940. DOL's notice regulations are not consistent with the purpose of the FMLA.

C. Adequate Alternative Safeguards Exist To Ensure That Employees Know of Their Rights Granted by the FMLA.

Adequate alternative remedies are available to employees who justifiably rely to their detriment on additional employer-provided leave. The FMLA explicitly provides that:

> Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

29 U.S.C. § 2652.

The regulations further provide that "[a]n employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." 29 C.F.R. § 825.700(a).

Thus, the statute and regulations make it clear that employees have recourse under state or, in the case of collective bargaining agreements, federal contract law. Dis-

putes regarding leave rights in *excess of the FMLA entitlement*, however, do not state a claim under the FMLA.

As the court in *Rich v. Delta Air Lines*, 921 F. Supp. 767 (N.D. Ga. 1996), explains:

> The plaintiff apparently construes this section to mean that when an employer has an employee benefit program or plan that is more generous than the benefits provided by the FMLA, then the employee automatically has a cause of action, *under the FMLA*, to enforce the terms of the program or plan if the employer deviates from such a program. [The regulation] does not, and could not, however, create a federal cause of action under the FMLA to enforce voluntary employer policies of providing benefits that exceed those required by the FMLA.
>
> . . .
>
> [T]he regulation is merely a truism, which emphasizes that employers are legally bound by valid contractual agreements made with their employees regarding employment benefits. An employer's contractual obligations are distinct from . . . the FMLA itself.

921 F. Supp. at 773 (emphasis added).

As the *Rich* decision correctly recognizes, not all disputes must be resolved through federal FMLA lawsuits.

Moreover, in appropriate circumstances, federal courts would be justified in using their equitable powers to estop employers from asserting that excess employee leave was not protected by the FMLA. For example, where the employer allegedly misleads an employee into believing that leave will be protected, a court might reasonably permit a suit to proceed under the FMLA on equitable grounds. *See Ragsdale*, 218 F.3d at 939-40 (describing scenarios where an employer's failure to provide notice may interfere with an employee's substantive FMLA rights). This is far different than the DOL regulations at issue in this case, which

essentially require courts *per se* to estop defendants who have not specifically designated leave as "FMLA leave," regardless of the equities of the case.

The folly of the DOL approach is that it suggests an employee with a serious health condition can plan whether or not he or she remains sick. If an employee is able to perform the essential functions of the job, he or she should return to work. On the other hand, if the employee is not able to work, he or she must remain out of the workplace, regardless of how much protected leave exists. Such an individual could not have "planned" his or her leave so as not to exceed the twelve week limit, nor could such an individual have "unwittingly" given up his or her FMLA rights by remaining on leave in excess of twelve weeks. Such an individual *necessarily must* take leave because he or she is incapable of performing the job. *See, e.g., Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 161-62 (2d Cir. 1999) (because leave was necessitated by an unanticipated medical condition, and because employee's inability to return to work continued well beyond twelve weeks of leave, the court found it impossible for employer's alleged failure to give proper notice to have interfered in any way with the employee's exercise of FMLA rights). Clearly, applying the DOL notice requirements in such circumstances is nothing short of irrational.

III. THE FMLA NOTICE REGULATIONS DISCOURAGE EMPLOYERS FROM ADOPTING OR RETAINING LEAVE POLICIES MORE GENEROUS THAN THE FMLA REQUIRES.

When passing the FMLA, Congress recognized that many employers already provided leave for employees, in many cases greater than that provided for by the FMLA. In an attempt to preserve this status quo, Congress explicitly stated in the FMLA that:

> Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

29 U.S.C. § 2653.

Unfortunately, DOL's notice regulation serves to accomplish exactly what this statutory section prohibits: it serves to discourage employers from providing more generous leave policies.

Congress designed the FMLA to achieve two principal goals: to encourage employers voluntarily to establish and maintain generous family and medical leave policies; and to provide employees who are not covered by such policies with a minimum employment standard for unpaid leave. *See* 29 U.S.C. § 2601(b). *See also* S. Rep. No. 103-3, at 3-5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 5-7. The statute was never intended to be used to punish employers who provide more generous plans with federal lawsuits simply because those employers failed to comply with an administratively-created technical notice requirement.

The legislative history clearly reveals Congress' intentions. The FMLA "accommodates the important societal interest in assisting families, by establishing a minimum labor standard for leave." S. Rep. No. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 6. The statute "is based on the same principle as the child labor laws, the minimum wage . . . and other labor laws that establish *minimum* standards for employment." *Id.*, *reprinted in* 1993 U.S.C.C.A.N. at 6-7. (emphasis added). Congress drafted the FMLA "to provide a security net for families by setting a minimum employment standard for unpaid leave that is required on the basis of medical necessity," *Johnson v. Primerica*, 3 Wage & Hour Cas. 2d 109, 111 (S.D.N.Y. 1996) (emphasis added).

As is the case with all other minimum labor standards legislation, the FMLA was not intended to discourage or

punish those employers—such as the one in this case—that voluntarily exceeded their legal obligations. In passing the FMLA, Congress was particularly mindful to point this out. Indeed, Senator Coats, a supporter of the FMLA, commented on the rationale for passing the FMLA:

> While this legislation is not a perfect solution, indeed, I had hoped for many years that it would not have been necessary, it represents a sincere attempt to address the needs of business and working families. To remain competitive in the global economy, to recruit and retain good employees and to improve productivity, particularly in a time of growing labor shortages, employers have recognized the need to offer more attractive benefits to its [SIC] employees. *Many already offer plans similar to the one in this legislation and those employers should be commended. However, there are those employers who have policies that are not only unfavorable to families, but are actually hostile toward families. Those are the employers we are trying to reach with this legislation.*

138 Cong. Rec. S1298 (daily ed. Aug. 11, 1992) (emphasis added).

The report of the House Committee on Education and Labor also indicated that the purpose of enacting the FMLA was not to present additional burdens to those companies that already provided leave to their employees, but to protect those employees who worked for companies that did not have such policies. In reviewing studies that analyzed the number of companies that did provide leave for employees prior to the enactment of the FMLA, the committee noted:

> These studies, taken together, indicate that while many employers are providing family and medical leave to their employees, a significant percentage of employers of all sizes have yet to adopt such policies.

H.R. Rep. No. 103-8, pt.1, at 28 (1993).

Unfortunately, it is the unsuspecting "good" employer—*i.e.*, the one with a generous (often paid) company leave policy—that will fall into DOL's regulatory web. The employer in this case presents a perfect example. Since Ragsdale lacked the minimum year of service required for eligibility for FMLA leave, Wolverine could have terminated her employment, but it did not. Instead, it gave her seven months of leave, more than twice the FMLA requirement. In DOL's view, Wolverine's generosity placed it in violation of the FMLA. Congress clearly did not intend this result.

By requiring employers to grant employees twelve weeks of leave in addition to their standard leave policies in the event the employer fails to designate an employee's initial leave period as "FMLA covered," DOL's regulation discourages employers from adopting or retaining more generous leave policies. Indeed, an employer has no incentive to provide leave to employees in excess of the federally mandated twelve weeks of leave when it is prohibited from counting such leave towards an employee's FMLA entitlement simply because it failed to designate the leave as "FMLA covered" up front. Thus, rather than providing additional leave, employers may choose simply to give employees only the federal entitlement, thereby eliminating the administrative obstacles to providing worthwhile benefits to employees. DOL's position provides a classic example of the adage "no good deed goes unpunished."

DOL's regulations contain sufficient safeguards to alert employees as to their rights under the FMLA. Section 825.300 of DOL's regulations requires that employers post in conspicuous locations a notice that explains an employee's rights under the FMLA. 29 C.F.R. § 825.300. In addition, 29 C.F.R. § 825.301 requires employers to supplement any written guidance employers make available to employees with an explanation of the employer's policy pertaining to the FMLA. Therefore, an employee cannot claim to be unaware

of his or her rights under the FMLA if an employer complies with these regulatory mandates.

DOL essentially argues that to designate leave as FMLA leave "up front" is a *de minimis* burden for employers. Apparently, it does not appreciate the paperwork burden this requirement generates for employers with thousands—let alone hundreds of thousands—of employees, any number of whom may be taking leave at any given moment. DOL's regulations specifying what constitutes adequate notice, create a complex administrative web of compliance obligations riddled with ifs, ands, and buts, all creating pitfalls for the unsuspecting employer. *See generally*, 29 C.F.R. § 825.208(a)-(e); 29 C.F.R. § 825.301(a)-(f). For example, one section steers the employer through its obligation to interrogate an employee (or an employee's representative) who has requested leave that sounds like it might be covered by the FMLA, since the employee need not actually name the statute to gain its protection. 29 C.F.R. § 825.208(a)(1) and (2). Another outlines the distinction between a "preliminary" and "final" designation. 29 C.F.R. § 825.208(e)(2). Still another outlines the seven other topics on which DOL requires an employer to give notice, in addition to designating the leave as FMLA-covered. 29 C.F.R. § 825.301(b)(1)(ii), (iii), (iv), (v), (vi), (vii), and (viii). DOL allows an employer only two business days to make the designation. 29 C.F.R. § 825.208(b)(1). Oral notice must be followed by written notice. 29 C.F.R. § 825.208(b)(2).

Under the statute, the employer complies by granting leave when the employee requests it. Given the statute's explicit posting requirement, the employer does not compromise the employee's rights under the statute simply by failing to notify that the leave is "FMLA-covered" up front. DOL's regulations actually encourage employees not to mention the FMLA with the hope that they can receive FMLA protected leave indefinitely.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully urge that the judgment below be upheld with the direction that the Secretary of Labor's FMLA notice regulations are invalid and cannot be enforced.

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In The

Supreme Court of the United States

TRACY RAGSDALE, et al.,

Petitioners,

v.

WOLVERINE WORLDWIDE, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Society for Human Resource Management ("SHRM") is the leading voice of the human resource profession. SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 165,000 professional and student members throughout the world. As the world's largest human resource management association, SHRM is a founding member of the North American Human Resource Management Association and a founding member and Secretariat of the World Federation of Personnel Management Associations.

As the leading association of the human resources profession, SHRM and its members are vitally concerned with the orderly development of the law concerning employee benefits, including paid and unpaid leave for medical, maternity, paternity and family care reasons. SHRM has long recognized its special responsibility to support and encourage compliance with the laws regulating employment and in the administration of efficient, workable human resource management systems.

In 1997, SHRM founded the National FMLA Technical Corrections Coalition. The Coalition is a diverse, broad-based, nonpartisan group of approximately 300 leading companies and associations. Members of the

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Coalition are fully committed to complying with both the spirit and the letter of the Family and Medical Leave Act ("FMLA") and strongly believe that employers should provide policies and programs to accommodate the individual work-life needs of their employees. At the same time, members of the Coalition believe that the FMLA should be fixed to protect those employees that Congress aimed to assist while streamlining administrative problems that have arisen.

With respect to this case, SHRM's interest is to support rules concerning leave entitlement and return to work that strike an appropriate and judicious balance between statutorily-mandated unpaid leave benefits and existing leave plans which in many cases provide pay, benefits and greater lengths of leave. Representatives and members of SHRM have appeared before Congress with respect to oversight and proposed changes of the FMLA and have submitted comments to the Department of Labor ("DOL") on proposed regulations implementing the FMLA.

INTRODUCTION

This case presents important questions concerning the validity of regulations adopted by the DOL pursuant to the Family and Medical Leave Act of 1993. Under the FMLA an employee is "entitled to a total of 12 workweeks" annually of unpaid FMLA leave. 29 U.S.C. § 2612(a)(1). The DOL's regulations also provide, "An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave" annually. 29 C.F.R. § 825.200(a). However, through the regulations at issue,

the DOL has greatly expanded upon or acted contrary to this simple concept by providing for leaves beyond 12 weeks annually.

Congress recognized that certain employers were already providing paid leave for purposes for which FMLA leave was also required and sought to provide credit to such responsible employers. In such a case Congress provided, "an eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave or medical or sick leave of the employee for leave" provided under the FMLA. 29 U.S.C. § 2612(d)(2)(B). Congress also provided "[i]f an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave . . . may be provided without compensation." 29 U.S.C. § 2612(d)(1).

This simple concept of accommodation of existing leave policies has been complicated by the DOL's confusing and conflicting regulations, including those at issue in this case, § 825.208(c) and § 825.700(a). In short, where employer-provided leave is available, the DOL has imposed upon employers notice and designation obligations, which if not observed, dramatically extend the leave time by a stacking penalty that applies across-the-board to add FMLA leave to existing employer-provided leave and extend the FMLA's job protections to the pre-designation weeks of leave as well as the post-designation 12 weeks of leave. Section 825.208(c) begins, "If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the

time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later." If an employer has requisite knowledge to determine that company provided paid leave is for an FMLA reason and "fails to designate the leave as FMLA leave," the employer "may not designate leave as FMLA leave retroactively, and may designate" the leave as FMLA leave "only prospectively." According to 29 C.F.R. § 825.208(c), "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement." This stacking penalty for failure to designate is also set forth in § 825.700(a) and addresses unpaid as well as paid employer-provided leave.

The Eighth and Eleventh Circuits, and several district courts, have found the additional leave stacking penalty contrary to the plain language of the statute and Congressional intent.

SUMMARY OF ARGUMENT

In enacting the FMLA, Congress created an entitlement of a total of 12 workweeks of unpaid job-protected leave annually for employees who meet specific eligibility criteria. Employees are advised of this right to a total of 12 weeks of unpaid leave by notice prepared by the DOL and posted by employers. Congress recognized that many employers also were voluntarily providing paid and unpaid leave for reasons set forth in the FMLA.

In the case of employer-provided leave, Congress decided there was to be a total of 12 weeks, whether paid or unpaid. Petitioner argues that employees are entitled to leave under the employer's voluntary program and then up to 12 workweeks of job-protected FMLA leave unless the employer specifically notifies the employee that the two periods of unpaid leave are running concurrently. In the instant case, Petitioner claims entitlement to 42 weeks of leave in one year because Respondent failed to give her such notice.

The requirement in the regulations that employers stack FMLA and employer-provided leaves is not provided for in the statute and is contrary to it. If Congress had intended for employees to be entitled to more than 12 workweeks of leave annually, Congress would have enacted provisions to that effect, indicating the conditions when an employee qualifies for additional weeks of leave. Because Congress did not do so, the 12 workweek maximum must be applied by the courts. Indeed, the legislative history further demonstrates the stacking penalty is clearly improper as it penalizes responsible employers and discourages more expansive voluntary leave programs.

There may be cases where employees do not elect to substitute employer-provided paid leave for unpaid FMLA leave or inquire about the concurrent running of employer-provided leave and FMLA leave, yet the employer elects to substitute company leave for FMLA leave. As shown by the facts here, other more reasonable notice provisions adequately ensure sufficient notice of the employer's election to substitute. If an employer fails to provide adequate notice and it works to the detriment

of an employee, causing interference with the employee's exercise of her statutory rights, – not the case below – Congress has expressly provided a detailed and carefully crafted remedy. In such a case, the employee may seek to enforce any denied FMLA rights in court and seek the monetary and injunctive relief provided in 29 U.S.C. § 2617(a).

ARGUMENT

I. The Penalty Provisions For Failing to Timely Designate Are Contrary to the Act and Not a Reasonable Construction of It.

In administering the FMLA, the Secretary of Labor is authorized to issue regulations "as are necessary to carry out" the provisions and purposes of the Act. 29 U.S.C. § 2654. However, the FMLA as defined in the DOL's conflicting regulations is significantly different than the FMLA legislated by Congress. At issue in this case are the DOL's regulations which significantly expand and contradict the core component of the Act – an employee's entitlement to a *total* of 12 workweeks of FMLA leave per year.

In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), this Court set forth a two-step test for determining the validity of regulations such as the ones at issue in this matter. First the Court must determine if Congress has "directly spoken to the precise question at issue." *Id.* at 842. If the Court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."

Id. at 843 n.9. In the event Congress has not directly spoken to the precise question and thus the statute is silent or ambiguous on the issue, the Court must determine if "the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Constructions that are contrary to clear congressional intent must be rejected. *Id.* at 843 n.9.

Applying *Chevron's* test, the Eighth Circuit properly found the regulations providing for additional leave invalid. *See Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 937-938 (8th Cir. 2000). The Eleventh Circuit and several lower courts have also found the regulations invalid under the *Chevron* test or the principles articulated therein. *See, e.g., McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999) (concluding employer's failure to designate paid leave as FMLA leave did not entitle employee to 12 weeks of unpaid leave stacked on top of 13 weeks of paid leave because the regulations requiring such a result are invalid and unenforceable whether the Act is viewed as clear and the regulations clearly contrary to the Act or whether the Act is viewed as somewhat ambiguous and the regulations manifestly contrary to the Act); *Fulham v. HSBC Bank USA*, 2001 WL 1029051 *7 (S.D. N.Y., Sept. 6, 2001) (finding employer's failure to designate paid leave as FMLA leave did not entitle employee to 12 weeks of unpaid leave stacked on top of his 26 weeks of paid leave because regulations requiring such a result were contrary to the Act); *Twyman v. Dilks*, 2000 WL 1277917, *13-14 (E.D. Pa., Sept. 8, 2000) (invalidating regulations as "directly inconsistent" with the Act's express language and inconsistent with the purpose of the Act); *Howell v. Standard Motor Products, Inc.*, 2001 WL 912387, *3

(N.D. Tex., Aug. 10, 2001) (finding employer's failure to designate unpaid leave as FMLA leave did not entitle employee to 12 additional weeks of unpaid FMLA leave and predicting Fifth Circuit would agree with Eighth and Eleventh Circuits on invalidity of penalty regulations); *Nolan v. Hypercom Mfg. Res.*, 2001 WL 378235 *7 (D. Ariz., March 26, 2001) (finding regulation invalid because it provides employees more leave than the substantive guarantees of the statute). This Court should similarly declare the regulations requiring more than 12 weeks of leave invalid as they are contrary to the Act and not a reasonable construction of it.

The Act expressly provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period. . . . " 29 U.S.C. § 2612(a)(1). This provision is not ambiguous. This provision is obviously not silent as to the total number of workweeks of leave an employee is entitled to under the Act. This maximum allowance is restated again when permission is granted to an employer to substitute paid leave under its benefit plans for all or a portion of the mandated total of 12 weeks annually. In such a case, in the same section, Congress declared that "[i]f an employer provides paid leave for fewer than 12 weeks, the additional weeks of leave *necessary to attain* the 12 workweeks of leave . . . may be provided without compensation." 29 U.S.C. § 2612(d)(1) (emphasis added). Under the express and unambiguous language of the Act, an employer is required only to provide up to a total of 12 weeks of leave per year. The 12 week total expressly includes both paid leave and unpaid leave. Thus, the Act

does not require the employer to stack unpaid FMLA leave on top of employer-provided paid or unpaid leave.

Notwithstanding the express and unambiguous language of the Act, §§ 825.208(c) and 825.700(a) improperly convert the unpaid leave up to a "total of 12 workweeks" annually into an entitlement to 12 additional weeks unless the employer specifically notifies the employee within two business days that he or she is taking FMLA leave. This designation, under the regulation, applies "only prospectively as of the date of notification. . . . " § 825.208(c). Thus, under the DOL's regulations, an employer may be "forced" to provide many more than 12 weeks of leave per year should the employer fail to provide certain notice. *Ragsdale*, 218 F.3d at 938. Indeed, if the regulations were applied as urged by Petitioner, she would have received a total of 42 weeks of leave in a single year.

This "disproportionate penalty" for failing to designate, *Ragsdale*, 218 F.3d at 938, which requires an employer to provide more than 12 weeks of leave annually, is entirely a creation of the DOL and contradicts the clear and unambiguous language in the Act. Those supporting the validity of the stacking penalty under the *Chevron* test do so by first attempting to validate and justify the designation and notice provisions and then bootstrapping the stacking penalty onto those requirements. Indeed, after arguing for the validity of the designation and notice provisions, the Solicitor General characterizes the stacking of leave as no penalty at all, but merely the "consequence" of an employer's failure to

designate.[2] In analyzing the *Chevron* test, the Solicitor focuses on Congress' silence as to the timing of the employer's "paid leave" election under § 2612(d)(1) but ignores the clear language of the statute that manifestly is not silent as to the propriety of the stacking penalty or "consequence" for failing to timely designate and the statute's carefully crafted remedy for an interference with FMLA rights. *See* 29 U.S.C. §§ 2612(a)(1) and 2617.

While some "consequence" may be appropriate for an employer's failure to designate paid leave as FMLA leave in the case of detrimental reliance, as we discuss below, Congress provided for and carefully detailed the remedial relief available. *See* 29 U.S.C. § 2617(a)(1)(A)(i),(ii) and (iii) and § 2617(a)(1)(B). The "consequence" or penalty selected by the DOL and imposed by § 825.208(c) and 825.700(a) dramatically contradicts the clear language of the Act, ignores the remedy provided by Congress, and greatly expands upon the Act's leave entitlement. Thus, the stacking penalty or "consequence" is invalid and must be stricken.

Not only are the regulations expressly contrary to the Act, they are also not a reasonable construction of it. As the Eleventh Circuit stated, "The regulations not only add requirements and grant entitlements beyond those of the

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[2] The Sixth Circuit employed a similar bootstrapping analysis to validate the stacking penalty. *See Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 935-36 (6th Cir. 2000) (finding the statute silent as to the notice an employer must give to employees before designating leave and then assuming without further analysis that the provision forbidding retroactive designation is therefore also valid).

statute but they also are inconsistent with the stated purpose of the statute." *McGregor*, 180 F.3d at 1308. An express purpose of the Act is "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3). Indeed, as noted by the Eighth Circuit below, "[t]he provisions of the FMLA are noticeably bereft of any purpose to interfere with employer leave policies which grant greater leave rights than the FMLA or to require more generous leave plans than the minimum twelve weeks of unpaid leave mandated by the FMLA." *Ragsdale*, 218 F.3d at 937.

Because of the two-day time period for designating FMLA leave and the resulting stacking for failure to designate, a claimant is almost always assured of having longer than "the total of 12 workweeks" mandated by Congress.[3] Requiring this quick designation and denying retroactive application runs counter to the Act's express purpose of accommodating the legitimate interests of employers and encouraging employers to adopt more generous leave plans. There is probably no better illustration of the lack of congruency between the purpose of the Act and the practical result of the DOL's regulations than the outcome sought by Petitioner in this case, i.e. 12 weeks of unpaid FMLA leave stacked on top of 30 weeks of unpaid leave provided by Respondent.

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[3] As one plaintiff argued, " . . . the regulation carries an implicit penalty awarding an employee an additional day of FMLA leave for each day the employer is late in making the designation (hence the 37 days of additional leave claimed by Daley)." *Daley v. Wellpoint Health Networks, Inc., et al.*, 146 F.Supp.2d 92, 99 (D. Mass. 2001).

As stated by the Eighth Circuit, the obvious purpose of counting paid leave – as expressly contemplated by Congress – as part of the employee's 12 weeks is to ensure that neither an employee nor an employer will be disadvantaged by the existence of the FMLA. *Ragsdale*, 218 F.3d at 938. The statutory provision, as the Eighth Circuit further noted, protects the employer when an employee requests FMLA leave by not requiring the employer to provide paid leave on top of the 12 weeks of FMLA leave. *Id*. Moreover, this substitution provision further illustrates Congress' intent to not require employers to stack FMLA leave on top of the employer-provided leave. However, the DOL improperly seized upon the designation provision as the thin reed on which to impose a wildly disproportionate penalty in those cases where the employer fails to notify the employee that employer leave, whether paid or unpaid, and FMLA leave run concurrently. Thus, the regulations are inconsistent with and manifestly contrary to the Act and its stated purposes. They should be declared invalid under *Chevron*.

II. The Disproportionate, Stacking Penalty Which Requires an Employer to Provide Both Company Designed Leave and FMLA Leave Is Contrary to Congressional Intent and Is Not Necessary to Implement the Act.

A. Imposing a disproportionate stacking of leave penalty on employers who already provide paid or unpaid medical, family and maternity leave is contrary to Congressional intent.

Not only is the stacking penalty contrary to express statutory language carefully crafted after much study and

debate by Congress, the stacking of FMLA leave onto employer-provided leave is contrary to Congressional intent. The legislative history abundantly demonstrates that (a) Congress wanted to applaud, rather than penalize employers who voluntarily provide leave for FMLA purposes; (b) Congress was persuaded that on balance the 12-week allotment was appropriate given the need to adjust work schedules or hire temporary replacements and thus provided for substitution of company paid leave for FMLA unpaid leave as an option; and (c) Congress wanted to encourage – not discourage or penalize – employers to adopt more generous leave policies than provided by the FMLA. The stacking penalty is contrary to each of these Congressional purposes.

Congress, in 1993, determined that some private employers were not providing sufficient leave of absence from work for medical, maternity or parental assistance reasons, thus in some cases, forcing employees to choose between families and work or to lose their jobs due to an inability to work because of health conditions. Cited studies found that only 37% of workers in private business were covered by "maternity" leave and only 18% were covered by unpaid "paternity" leave. Other studies found that 30% to 40% of businesses did not offer job guaranteed sick leave. S. Rep. No. 103-3, at 15 (1993), *reprinted in* 1993 U.S.C.C.A.N., Vol. 2 at 17 ("Senate Report"). This Senate Report concluded:

> These studies, taken together, indicate that while many employers are providing family and medical leaves to their employees, a significant percentage of employers of all sizes have yet to adopt such policies.

Id. President Clinton, in his signing statement, *id.* at 54-55, observed that "although many enlightened companies have recognized the benefits to be realized from a system providing for family and medical leave, not all do. . . . We must extend the success of those forward-looking workplaces where high performance teamwork has already begun to take root and where family and medical leave already is accepted."

Second, as noted above, employers who provided paid leave under existing benefit plans were permitted by Congress in 29 U.S.C. § 2612(d)(1) and (2) to take credit for those existing leave provisions. But the maximum of 12 weeks remained in place: "When an employer has required or an employee has elected to substitute for unpaid leave appropriate paid leave of less than 12 weeks duration, the employer need only provide an additional period of unpaid leave so that *the total of paid and unpaid* leave provided equals 12 weeks." Senate Report at 29 (emphasis added); HR Rep. No. 102-135, at 41 (1991) (same).

The 12-week maximum and minimum was carefully selected after years of study and debate. For a number of years, mandated leave had been the subject of considerable debate. In 1991, proposed identical FMLA legislation was not passed but the House Report (HR Rep. No. 102-135) reflected extensive debate concerning the appropriate amount of leave. Also, it was concluded that employers were to be accommodated, particularly those who furnished leave under their existing voluntary plans. The House Report provided:

> The amount of time available for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees' perspective, a twelve week minimum represents a middle ground between the family needs of workers and an employer's business needs. Employers are, of course, free to and are encouraged to provide longer leaves.

H.R. Rep. No. 102-135, at 37 (1991). Like the Act which was finally passed in 1993, the 1991 bill permitted the employer to substitute certain paid leaves for mandated unpaid leave. Accordingly, an employer may require the employee to take paid vacation or paid personal leave for any part of the leave required under the Act. *Id.* at 41. Congress only cautioned that an employer may not trade shorter periods of paid leave for the longer periods of unpaid leave prescribed by the Act. *Id.* at 42. The 1991 Report concluded: "Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any *remaining leave time* made available by the Act, on an unpaid basis." *Id.* (Emphasis added). Indeed, the DOL's final regulations provide: "An eligible employee's FMLA leave entitlement is *limited* to a *total* of 12 workweeks of leave during any 12 month period for any one, or more, of the following reasons. . . . " § 825.200(a) (emphasis added).

The stacking penalty in case of a failure to notify and designate runs contrary to this carefully designed approach to leave. The disproportionate stacking penalty

exclusively penalizes those "enlightened" and "forward-looking" employers who voluntarily provided leave, particularly paid leave in substantial amounts, in addition to FMLA leave. Accordingly, since the disproportionate stacking penalty in § 825.208(c) and § 825.700(a) falls exclusively on those employers already providing paid or unpaid leave, it is clearly contrary to Congressional intent.

Not only did Congress provide for a "total" of 12 weeks of leave because of scheduling difficulties which might otherwise arise and accommodate "enlightened" employers by allowing substitution of employer-provided leave for mandated leave, Congress expressly wanted to encourage employers to provide even greater benefits than those contemplated by the Act. 29 U.S.C. § 2653 provides:

> Nothing in this Act or in any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with requirements under this Act or any amendment made by this Act.

The Society for Human Resource Management respectfully submits that nothing discourages employers more from adopting more generous leave policies than the conflicting and confusing regulations of the DOL and their arbitrary, disproportionate stacking penalty for a "failure to notify" when that failure does not adversely affect an employee's receipt of statutory rights, as shown by the facts here.

B. The disproportionate stacking of FMLA leave on employer-provided paid or unpaid leave is not necessary to effectuate the Act.

As noted, 29 U.S.C. § 2654 authorizes the Secretary of Labor to develop regulations "as are necessary to carry out" the Act. The stacking penalty is not only contrary to the Act and legislative intent, it is not necessary to "carry out" the Act. This is particularly true in the case of unpaid leave which is at issue in this case.

The interim final regulations published on June 4, 1993 (58 Fed. Reg. 31794) focused only on the election by the employer to substitute paid leave for FMLA leave. The interim final version of § 825.208(c) did not impose a stacking penalty in the event the employer failed, or was tardy, in designating that the FMLA leave was to run concurrently with employer furnished *paid* leave. In addition, the interim final regulations, as do the final regulations, provided for a retroactive counting of leave as FMLA leave in the situation where an employer seeks to designate leave as FMLA leave after the leave has begun. *See* § 825.208(d). Further, in the final regulations, employers may designate leave as FMLA leave retroactively even after the employee has returned to work in two situations: (1) where the employer did not learn the reason for the absence until the employee's return or (2) where the employer knew the reason for the leave but was not able to confirm that the leave qualifies under the FMLA (e.g., the requested medical certification had not been received by the employer). *See* § 825.208(e). As the above provisions demonstrate, "retroactivity" is not contrary to the intent and purposes of the Act, and final

§ 825.208(c)'s prohibition on retroactivity when substitution of paid leave occurs is not necessary to ensure that employees receive their FMLA benefits.

This stacking penalty in § 825.208(c) and § 825.700(a) cannot be justified by citing an alleged need to notify employees of their rights and obligations under the Act. Congress provided for notice in a number of instances. *See* 29 U.S.C. § 2619 (requiring employers to post notices prepared or approved by the DOL summarizing the pertinent provisions of the law); 29 U.S.C. § 2612(e)(1) (notice obligation of employees to employers); 29 U.S.C. § 2614(b)(1)(A)-(B) (notice to key employees concerning lack of reinstatement rights). In addition, the DOL in the other regulations has imposed additional notice provisions on the employer. *See* § 825.301(a)(1) (information concerning FMLA entitlements and employee obligations must be included in employee handbook or other document) and § 825.301(a)(2) (providing written guidelines to employees concerning the employees' rights and obligations under the FMLA if an employer does not generally publish written policies, manuals and handbooks).

Indeed, the DOL, in explaining the regulations at issue, did not justify the stacking penalty as necessary to compel employers to provide information on the FMLA. Rather, the comments which accompanied the final regulation and which were published in the Federal Register on January 6, 1995 (60 Fed. Reg. 2180) reflect an entirely different focus on the part of the DOL. A review of the justification demonstrates it is contrary to the intent of Congress. At that time, the DOL, in referring to the final version of § 825.208, which first contained the stacking

penalty and prohibition on retroactive designation, stated:

> This section was intended to resolve the question of FMLA designation as early as possible in the leave request process, to eliminate protracted "after the fact" disputes. . . . Because of the possible "stacking" of unpaid FMLA leave entitlements in addition to an employer's preexisting leave plan, it appears that some employers that wished to mitigate their exposure to extended leaves by employees have been motivated by the provisions in the Interim Final Rule to try to determine and count all possible FMLA-qualifying absences as FMLA leaves (by whatever means, including through overly-intrusive inquiries of employees when they request to use their accrued paid leave). . . . [Discussion of various comments deleted.] After careful consideration of the many comments and objections received on this section, the Department has revised the regulation along the following lines. . . . If the employer has the requisite knowledge to determine that a leave is for an FMLA reason at the time the employee either gives notice of the need for leave or it commences, and the employer does not notify the employee as required at that time that the leave is being designated as FMLA leave, the employer may not then designate the leave as FMLA leave retroactively; it may designate only prospectively, as of the date of notification to the employee of the designation. . . .

60 Fed. Reg. at 2207-2208.[4]

[4] In their briefs below and before this Court, counsel for Petitioner and Amicus in support of Petitioner assert various

In short, in the regulations at issue, the DOL, and some commentators, were attempting to second guess the provision for substitution of paid leave for FMLA leave (and concurrent running of leave periods) which Congress expressly intended. Certainly, it is not contrary to Congressional intent or the purpose of the FMLA for employers to be concerned about "extended leaves by employees" over the "total" of 12 weeks contemplated by the FMLA.

Accordingly, the requirement that FMLA leave be stacked on top of employer-provided paid or unpaid leave is indeed a "disproportionate penalty" as the Eighth Circuit held, and is not necessary to carry out or implement the Act.

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rationale for imposing the stacking penalty. Such "post hoc rationalizations" by appellate counsel must be rejected. *See N.L.R.B. v. Metro. Life Ins. Co.*, 380 U.S. 438, 444 (1965) ("for reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review"), *citing Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("courts may not accept appellate counsel's post hoc rationalizations for agency action"). This seems particularly true where different sections of the same regulations point in different directions; some regulations providing for retroactivity while others prohibit retroactivity; some regulations impose a stacking penalty, others only prohibit an employer from taking adverse action against an employee and denying their statutory rights by failing to provide notice.

C. The Act and other regulations protect both employees and employers and provide an appropriate remedy to protect employee FMLA rights.

1. Unpaid Leave

Congress provided for a total of 12 weeks of leave, job protection upon return from such leave, and sufficient notice of those rights to employees. 29 U.S.C. § 2619(a) requires an employer to post a notice to employees: "Each employer shall post and keep posted . . . a notice, to be prepared and approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge." Section 2619(b) provides the penalty for failure to post: "Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense." The final regulations in Appendix C set forth the notice to employees which is entitled "Your Rights Under the Family and Medical Leave Act of 1993." This notice unequivocally advises employees of their FMLA leave rights:

> FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons.

The kinds of leave protected by the FMLA are then specified.

No further notice to employees is required with respect to their FMLA leave rights and *unpaid* leave. This notice sufficiently advises employees of their "total" of 12 weeks of *unpaid* leave annually and places a duty upon them to inquire further if there is any doubt concerning

their leave entitlements or the duration of their leave. In *Nolan*, 2000 WL 378235 at * 7, the court, after an extensive analysis of the cases and the requirements of the FMLA, observed:

> The burden of communications does not rest on the employer alone. There is no reason why employees should not be required to understand the extent of their guaranteed leave. There is a clear basis in the statute for requiring employees to confer with employers about their anticipated absences. *See* 29 U.S.C. § 2612(e). Employees have a duty to notify employers of foreseeable births or planned medical treatments. *Id.* Absent some extraordinary medical obstacle, not alleged here, there is no reason why employers and employees cannot at the time of notice or within a few days thereafter determine when available leave shall be exhausted. This contemplates responsibility by employees, if they are interested in securing their jobs, and by employers. But as the statute plainly reflects, employees are in a better position to anticipate the amount of time off they will need, and they are more motivated to insure that their job will be protected while they are away.[5]

Certainly the notice of "up to 12 weeks of unpaid" leave is clear on its face. No further notice is required in the case of unpaid leave, as Congress recognized by its silence.

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[5] The DOL's regulations provide for resolution of disputes or questions "through discussions between the employee and the employer." § 825.208(b)(1).

2. Employer-Provided Paid Leave Substitution

In the case of employer-provided paid leave and the "substitution" (or "concurrent running") which Congress specifically addressed, the burden remains with the employee, for the reasons cited above, to inquire concerning the impact of paid leave policies. As Congress recognized, the employee may elect to use paid leave, if available. The mandated notice reflects this as well: "At the employee's or employer's option, certain kinds of paid leave may be substituted for unpaid leave." Clearly, the employee is on notice and must inquire about substitution of leave and the impact this has on the "total" of 12 weeks.

In many instances, in the paid leave situations, in fact there is no need for an "election" or designation by the *employer* at the time leave is requested, as contemplated and required by § 825.208(c). First, as noted, there is the situation where the employee elects to substitute accrued paid vacation, personal or medical/sick leave in order to receive the wages during the absence. Second, given the notice prepared by the DOL and posted, the employee will – or should – at least inquire in such cases as to paid leave and FMLA leave rights. In any event, it is difficult to believe an employee will not ask a rather straightforward simple question at or near the start of leave: when does my leave end and when must I be back at work to preserve my job?

The real issue with respect to "substitution" or "designation" occurs with respect to paid vacation or paid personal leaves which also may be substituted at either

the employee's or the employer's option for any qualifying FMLA unpaid leave. § 825.207(e). If neither the employee nor the employer elects to substitute paid leave for unpaid leave under the above conditions and circumstances, the employee will receive an unpaid leave and will remain entitled to all the paid vacation or personal paid leave which is earned or accrued under the terms of the employer's plan. Thus, the narrow circumstances under which an employer designation or substitution is required suggests again the disproportionate nature of the penalty imposed by the DOL by the burdensome notice provisions placed upon the employer in § 825.208(c).

Even in those instances of paid leave substitution where confusion may arise (e.g., paid vacation time or paid personal leaves), specific designation "within two business days" of notice of the qualifying nature of the leave should not be required if the employer through distribution of written materials, handbooks or benefit description advised the employee of the employer's practice to require substitution in those cases. *See* § 825.301(a)(1) and (2). Even where such information has not been provided prior to the leave request, there is no cause shown for the prohibition on "retroactive" designation which is permissible in other situations under the regulations.[6]

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[6] To the extent that § 825.301(b)(1) requires specific notice of this designation, it is contrary to the purposes of the Act particularly if previously provided by the employer in another form and by the DOL's approved poster.

3. Congress Provided a Detailed, Carefully Crafted Remedy.

Although not the case below, if the employer has not provided such information concerning substitution of paid leaves, or fails to designate and the employee loses statutory rights in reliance thereon, the employee has recourse for failure to notify in the case of detrimental reliance and loss of statutory rights. As the Eighth Circuit recognized, there can be cases where an employee relies upon statements made by the employer or relies upon the silence resulting from the employer's failure to make the substitution election. However, the "disproportionate" stacking is not the answer. Rather, the statute provides a detailed remedy if the employee has been damaged by the denial of 12 weeks of unpaid leave or reinstatement at the end of the 12 week period. *See* 29 U.S.C. § 2615(a)(1) and 2617(a). The enforcement provisions in 29 U.S.C. § 2617 and its detailed, carefully tailored exclusive damage and relief scheme expressly provide the remedy for the "interference with rights" described in § 2615(a). Indeed, as the Eighth Circuit observed, failure to give proper notice – where required in certain situations – "may function to interfere with or to deny an employee's substantive FMLA rights." 218 F.3d at 939. But Congress, while conferring a right in such cases, also provided a comprehensive and carefully crafted remedy which the DOL simply ignores and substitutes a disproportionate one.[7]

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[7] The Solicitor attempts to draw a parallel between the definition of FMLA "prohibited" acts in 29 U.S.C. § 2615(a)(1) ("it shall be unlawful for any employer to interfere with,

Thus, any failure of the employer to provide sufficient notice to the employees concerning their rights to paid leave should be dealt with under 29 U.S.C. § 2617 and pursuant to traditional concepts of law. *See Covey v. Methodist Hosp. of Dyersburg, Inc.*, 56 F.Supp.2d 965, 968 (W.D. Tenn. 1999) ("In order to succeed on a failure to inform claim, the plaintiff must show (1) that the defendant failed to correctly inform her of her FMLA rights;

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restrain or deny . . . any right provided under this subchapter") and a similar definition of unfair labor practice in the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise" of their Section 7 rights). While the NLRB may have wide discretion in interpreting and applying that phrase to employer conduct or misconduct, it does so in the context of adjudicating unfair labor practices under 29 U.S.C. § 160(a)-(c). Under FMLA that task was left to the courts by 29 U.S.C. § 2617. Next, the NLRB has not attempted to define what constitutes "interference with" or "restrain" or "coercion" by regulations. And even where the NLRB enters certain remedial orders pursuant to and following unfair labor practice adjudications, its powers can only be exercised consistent with the statute. *See, e.g., H.K. Porter Co., Inc. v. N.L.R.B.*, 397 U.S. 99, 108-109 (1970) (Board exceeded powers conferred by statute in ordering employer to implement a particular form of collective bargaining agreement: "The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself."); *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 307-311 (1965) (Board erred in concluding lock out in response to whipsaw strike constituted illegal interference, restraint or coercion under the Act, 380 U.S. at 318, because " . . . the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the functions of the section relied upon . . . " and constitutes an improper "assumption by an agency of major policy decisions properly made by Congress.").

and (2) that failure caused her to forfeit protections provided by the Act."); *Jeremy v. Northwest Ohio Dev. Ctr.*, 33 F.Supp.2d 635, 639 (N.D. Ohio 1999), *aff'd*, 210 F.3d 372 (6th Cir. 2000) ("Assuming that defendant did not provide adequate notice, plaintiff still fails to allege that this resulted in either forfeiture of FMLA protections or adverse consequences"); *Lacoparra v. Pergament Home Ctrs., Inc.*, 982 F.Supp. 213, 220-22 (S.D. N.Y. 1997) (employee alleges that employer provided insufficient notice of her rights and responsibilities under the FMLA as required by 29 C.F.R. § 825.301(a)(1) but court found no benefits under the FMLA were denied); *see also, Blankenship v. Buchanan Gen. Hosp.*, 999 F.Supp. 832 (W.D. Va. 1998) (discussing adequacy of notice in handbook and equitable estoppel claim).

Respondent's failure to designate in this case did not cause Petitioner to forfeit any protections under the FMLA. Petitioner's series of hypothetical examples of "options" allegedly lost due to lack of information are not supported factually, rely on inaccurate interpretations of the Act and regulations, ignore the notice Petitioner did receive from Respondent and demonstrate the practical difficulty – if not impossibility – facing employers as a result of the DOL's schemes. Even if Respondent had notified Petitioner on the first day of her leave that her FMLA leave and employer-provided leave ran concurrently, she could not have returned to work at the end of 12 weeks and would not have had any federally-protected job rights during the remaining weeks of her leave.

CONCLUSION

Petitioner received her unpaid leave entitlement of 12 weeks under the FMLA. There is simply no question about this. An additional grant of 30 weeks as a result of the disproportionate stacking penalty would clearly be contrary to Congressional intent. No election or designation was even contemplated by Congress in the case of unpaid leaves.

The stacking penalty imposed on employers when they fail to designate existing medical, sick, maternity or parental care paid leave – or even unpaid leave – as FMLA leave is not necessary to implement the Act. Indeed, it is contrary to the Act and to legislative intent. Congress clearly intended that employer-provided paid leaves – if the employee or employer elected – could run concurrently with FMLA leave and FMLA leave would not be stacked on top of employer-provided leave. Congress wished to encourage – not penalize – employers who provided greater leave than the FMLA.

No categorical disproportionate penalty should attach to an employer's failure to exercise its substitution option in a specific manner. The paid leave substitution option can be communicated in many ways – even by information distributed in advance or in handbooks, in plan booklets or other written literature. Where no information has been posted or previously provided, the "designation" of the paid leave as FMLA leave at some point may be required. However, retroactive designation does not run counter to the statute, as other regulations amply demonstrate.

If an interference with FMLA rights actually occurs, an employee may seek to utilize the Act's detailed, carefully crafted remedy. Utilizing the statutory remedy and traditional concepts of law, lower courts have struck a balance between employer rights expressly preserved by Congress and any loss of employee rights of "up to a total of twelve workweeks"of leave and reinstatement. This Court should follow suit. The DOL's disproportionate, categorical stacking penalty is contrary to the Act and Congressional intent and is not required to carry out the Act.

Respectfully submitted,

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